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IN THE

Supreme Court of the United States

October Term, 1966

No. 837

MAYFLOWER CONGREGATIONAL CHURCH,
a Michigan corporation,

Petitioner,

against

HELEN JOAN BERKAW, GRACE PFAFF, FRANK C. SMITH and ROY L. STEPHENS, Jr.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

LOREN T. WOOD,
Counsel for Petitioner,
No. 60 Wall Street,
New York, N. Y. 10005.

DAVID W. PECK of New York,
JOHN T. REDMOND of New York,
H. GORDON WOOD of Detroit,
LAURENCE D. CONNOR of Detroit,
EDWARD W. KEANE of New York,
of Counsel.

December 7, 1966

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Petitioner prays that a writ of certiorari issue to review a decision of the Supreme Court of the State of Michigan, entered in the above-entitled action on August 24, 1966.

Citation to Opinions Below

The Wayne County Circuit Court dismissed the bill of complaint without opinion, but its findings of fact and conclusions of law are found in its order and judgment dated April 13, 1964, which is unreported and which is printed in the separate Appendix hereto (1a-4a).* The

* References in parenthesis, unless otherwise indicated, refer to pages of the separate Appendix to the petition herein. References preceded by "Mich. Apx." refer to pages of "Appellants' Appendix in the Supreme Court of Michigan", pp. 1a-294a.

opinion of the Michigan Court of Appeals affirming the judgment of the Wayne County Circuit Court, printed in the Appendix (5a-13a), is reported in 1 Mich. App. 252, 135 N.W. 2d 553. The opinion of the Michigan Supreme Court reversing the decision of the Court of Appeals, printed in the Appendix (14a-46a), is reported in 378 Mich. 239, 144 N.W. 2d 455.

Jurisdiction

The decision of the Supreme Court of Michigan sought to be reviewed was dated and entered on August 24, 1966 and is printed in the Appendix (47a). On November 17, 1966 Mr. Justice Stewart signed an order extending petitioner's time to file a petition for writ of certiorari to and including December 7, 1966. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3) since petitioner claims a right under the Constitution of the United States.

Question Presented

This controversy arises out of the union of the Congregational Christian Churches in the United States and the Evangelical and Reformed Church to form the United Church of Christ.

Petitioner Mayflower, by vote of its congregation duly taken in accordance with its charter and by-laws, has elected to become a part of the United Church.

Respondents, plaintiffs below, are individual members of the Mayflower Church who dissented from this determination. In the present action they seek to have all of the property of the Mayflower Church vested in them on the ground that the union effects a *departure* from Congregationalism, the essence of which is the autonomy of local churches.

In a previous representative action, in which the plaintiffs represented all Congregational Christian churches and their members, it has been held that the union involves (as the New York Court of Appeals expressed it) "no intrusion in or abridgment of traditional congregational polity and usage through fellowship of independent autonomous congregations, free of authoritative control." *Cadman Memorial Congregational Soc'y* v. *Kenyon*, 306 N. Y. 151, 161 (1953).*

In four subsequent actions brought in four different courts it has been held that the foregoing determination in the *Cadman* case was a binding adjudication entitled to full faith and credit and determinative of the departure issue.** One of those actions, like the *Cadman* action, was a representative class action in behalf of all Congregational Christian churches and their members. *First Congregational Church & Society of Burlington, et al.* v. *Evangelical & Reformed Church, et al.*, 305 F. 2d 724 (USCA 2d 1962) cert. den. 372 U. S. 918.***

In the present case, however, the Michigan Supreme Court rejected the authority of these decisions and refused to give the *Cadman* and *Burlington* judgments full faith and credit on the ground that they had not determined the departure issue.

The question presented is whether, in holding that the *Cadman* and *Burlington* judgments are not determinative of the issue raised in the present action, the Supreme Court of Michigan failed to comply with the mandate of Article IV, Section 1 of the United States Constitution.

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* The New York Court of Appeals' opinion in the *Cadman* case is printed in the Appendix (48a-64a).

** A tabular summary of all the cases involving this union is printed in the appendix (105a).

*** The opinion of the U. S. District Court in the *Burlington* case is reported in 198 F. Supp. 677 and is printed in the Appendix (65a-89a); the U. S. Court of Appeals opinion is printed in the Appendix (90a-99a).

Constitutional and Statutory Provisions Involved

The constitutional provisions and statutes involved in this case are United States Constitution, Article IV, Section 1, and Title 28 U. S. C., Section 1738:

U. S. Constitution, Article IV, Section. 1:

> "Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Title 28 U.S.C. Sec. 1738:

> "Sec. 1738. State and Territorial Statutes and Judicial Proceedings; full faith and credit
>
> "The acts of the legislature of any state, territory or possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such state, territory or possession thereto.
>
> "The records and judicial proceedings of any court of any such state, territory or possession, or copies thereof, shall be proved or admitted in other courts within the United States and its territories and possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> "Such acts, records and judicial proceedings, or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such state, territory or possession from which they are taken."

Statement of the Case

Petitioner, defendant below, is a Congregational Christian church located in Detroit, Michigan. Respondents, representing a minority of the membership of Petitioner, seek a declaratory judgment invalidating the action taken

by the Petitioner to become a part of the United Church of Christ on the ground that the union would be a departure from the faith and usages to which the church property has been dedicated (Mich. Apx. 9a). Respondents also seek to enjoin Petitioner's officers from implementing such action and to quiet title to the church property.

Since its organization in 1930, Petitioner has been affiliated with the Congregational denomination.* Petitioner's action to become a part of the United Church of Christ was taken on April 30, 1961, at which time a majority of its members voted in favor of a resolution that the Petitioner become a part of the United Church of Christ (Mich. Apx. 35a). The validity of the procedure by which the vote was taken is not contested in this action.

Petitioner moved to dismiss the bill of complaint on the ground that the matters sought to be adjudicated had already been determined against the Respondents in the *Cadman* and *Burlington* cases, that Respondents were barred from litigating such matters on principles of res judicata and that the Michigan courts were obliged to give full faith and credit to the judgments of the court of New York and of the United States court sitting in New York (107a-108a).

The Circuit Court of Wayne County granted the motion and dismissed the complaint on the ground that the plaintiffs in both the *Cadman* and *Burlington* actions represented a class of which the Respondents were members and that they asserted rights and interests in the subject matter of the litigation which included all the rights and interests asserted by the Respondents in this action (3a-4a).

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* The Congregational denomination has been known as the Congregational Christian denomination since its 1931 union with the Christian denomination.

The Michigan Court of Appeals affirmed the judgment of the Circuit Court of Wayne County on identical grounds (5a-13a).

The Supreme Court of Michigan reversed on the ground that the New York Court of Appeals did "not consider the departure question" and "it had no jurisdiction or power so to do because there were no property interests shown so as to confer jurisdiction to decide this ecclesiastical question" (35a); hence the adjudications by the New York Court of Appeals and United States Court in New York did not preclude respondents from litigating the issue raised in the present case (43a).

The church union and resulting litigation

In order to give this Court a complete understanding of the case, it is necessary to set forth briefly the history of the denominational union which produced the United Church of Christ and a description of the prior litigation connected therewith.

A. *The Union.* In the late 1940's, the General Council of the Congregational Christian Churches, an unincorporated association which is the national fellowship body of the Congregational Christian denomination, and the Evangelical and Reformed Church formulated a "Basis of Union" under which the two communions would unite without break in their respective historic continuities (Mich. Apx. 68a). It provided for a voluntary union of churches, associations and conferences which would not abridge the rights previously enjoyed by the churches (51a-52a). A General Synod of the United Church of Christ was to be formed and was to prepare a constitution for the United Church of Christ based on the principles set forth in the Basis of Union (Mich. Apx. 43a). That constitution was prepared and declared in force on July 4, 1961.

B. *The Cadman Case.* In April, 1949 an action was brought in the New York State courts by the Cadman Church, an unincorporated religious body conducting the services and religious activities of the congregation, and the Cadman Society, a religious corporation having custody and control of the temporalities and property of the congregation. The plaintiffs, as the Federal District Court noted in *Burlington,* sued as representatives of all Congregational Christian churches and their members (74a). The defendant was the General Council aforesaid, which is composed of both laity and clergy representing individual Congregational Christian churches, local associations, state conferences and other affiliated organizations (50a).

The *Cadman* plaintiffs challenged the authority of the General Council to consummate the proposed plan of union on behalf of itself and on behalf of any Congregational Christian church desiring to participate (52a). As stated by the New York Court of Appeals, the complaint in the Cadman action proceeded "upon the theory that the proposed United Church of Christ is and will be so alien and different in structure and polity that fundamental Congregational usage and practice will be wholly lost and destroyed" (53a).

In addition to their claimed right to a declaration that the General Council lacked the power to consummate the union, the plaintiffs sought declarations that any Congregational Christian church which united with the United Church of Christ would remove itself from the Congregational Christian fellowship and that churches which did not unite would remain "the Congregational Christian Churches" (52a; Mich. Apx. 85a).

After trial, the Supreme Court of New York directed judgment on the merits for plaintiffs. A judgment was thereafter entered containing various declarations and an injunction against the General Council (Mich. Apx. 233a-241a). On appeal, the Appellate Division, Second De-

partment, reversed the judgment of the trial court on the law and the facts and dismissed the complaint (Mich. Apx. 241a-242a).

The New York Court of Appeals affirmed the judgment of the Appellate Division, holding that "there will be no intrusion in or abridgment of traditional congregational polity and usage through fellowship of independent autonomous congregations, free of authoritative control" (52a), and that "the proposed union will in no way change the historical and traditional pattern of the individual Congregational Christian Churches" and that "under these circumstances no ecclesiastical question is presented" (54a).

The New York Court of Appeals further considered plaintiffs' claim of right to the funds of the General Council, its boards, agencies and instrumentalities and held that their voluntary contributions created no proprietary or beneficial interest in these funds and assets and that plaintiffs had made no showing that the funds were to be used for other than authorized charter purposes (58a-59a).

In conclusion, the Court stated:

> "On this record, the proof having established that the Basis of Union is voluntary and in no way interferes with Congregational faith or manner of worship, and the plaintiffs having failed to establish any direct or beneficial interest in and to the unrestricted funds of the General Council, its various boards, agencies and instrumentalities, and having failed to show that any such general funds are to be used for other than authorized charter purposes, the complaint was properly dismissed on the merits" (59a).

C. *The Burlington Action.* The *Burlington* action was commenced three and a half years after the dismissal of the complaint in the *Cadman* action. The plaintiffs were a number of Congregational Christian churches and their

members.* They sued both individually and representatively on behalf of all Congregational Christian churches and their members (Mich. Apx. 87a). The defendants were the General Council, the boards and agencies affiliated with the Congregational Christian denomination and the Evangelical and Reformed Church. The issues raised in the *Burlington* action were exactly the same as those raised in the *Cadman* action.

Defendants pleaded the defense of res judicata, citing the *Cadman* judgment (Mich. Apx 223a *et seq.*). Plaintiffs sought to avoid the force of that prior judgment by claims that they possessed interests in the funds of the Congregational Christian boards and agencies different from those asserted by the *Cadman* plaintiffs and that the union had proceeded along lines substantially deviating from the plan established in the Basis of Union.

The United States District Court for the Southern District of New York ordered a separate trial of the issues thus raised with respect to the defenses of res judicata and estoppel by judgment. At the conclusion of the trial, judgment was entered dismissing the complaint on the ground that the questions raised had been previously adjudicated against all of the plaintiffs individually and against each and every class represented by the plaintiffs by the final adjudication on the merits of the New York Court of Appeals in the *Cadman* action (Mich. Apx. 129a-131a). The court held that all Congregational Christian churches and members thereof were within the class represented by the *Cadman* plaintiffs (74a). Further, in response to plaintiffs' claim that the union as consummated had deviated from the Basis of Union, the court found, *inter alia*, that the constitution of the United Church, here challenged by the plaintiffs, was in conformity with the original plan of union (85a).

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* A Michigan church (Pontiac) and a member of a Michigan church were among the named plaintiffs (Mich. Apx. 88a-89a).

On appeal, the United States Court of Appeals, Second Circuit, affirmed the judgment of the District Court dismissing the complaint (90a-99a). This Court denied certiorari. 372 U. S. 918 (1963).

D. *Other Cases.* Following the *Burlington* case, actions were brought in Ohio, Wisconsin and Wyoming that were in all substantial respects identical to the present action. In each of those cases a minority of the members of a local Congregational Christian church challenged the right of the church to enter the union. In each such action the church has prevailed and in each an identical plea of res judicata has been sustained. This court denied certiorari in the Ohio case. *Keith Wilson, et al.* v. *Washington Congregational Church,* 376 U.S. 912 (1964).*

The Michigan Supreme Court's Decision Is a Final Determination of an Issue Separable from the Merits of the Case and Reviewable by this Court Without Further Delay

The order of reversal in this action by the Supreme Court of Michigan is reviewable under 28 U.S.C. § 1257(3) as a final judgment or decree of the highest state court. By the decision below the Michigan Supreme Court has rejected petitioner's defense of res judicata, and no further review of that issue is possible in the state courts of Michigan. *Leland* v. *Ford,* 252 Mich. 547, 233 N.W. 410 (1930); *Myers* v. *Erwin,* 180 Mich. 469, 147 N.W. 458 (1914); *Monger* v. *New Era Assn.,* 171 Mich. 614, 137 N.W. 631 (1912); *People's Savings Bank* v. *Eberts,* 96 Mich. 396, 55 N.W. 996 (1893); *Hickox* v. *Railway Co.,* 94 Mich. 237, 53 N.W. 1105 (1892).

Although the order of the Michigan Supreme Court does not terminate this litigation, it is, nevertheless, a

* The Journal Entry dismissing the complaint in the Ohio case is printed in the Appendix (100a-104a).

final judgment or decree with respect to the issue of res judicata. A decision denying full faith and credit to the judgment of a sister state is final within the meaning of 28 U.S.C. § 1257 even though further proceedings remain in the trial court. *Johnson* v. *Muelberger*, 340 U.S. 581 (1950).

As this Court has held with respect to the reviewability of a similar question:

> "This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe that it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963).

The present action is clearly one of those which

> ". . . finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

See also *Construction Laborers' Union* v. *Curry*, 371 U.S. 542, 548-552 (1963).

The Michigan decision in this case presents a threat of serious erosion of national policy and law embodied in the full faith and credit clause of the United States Constitution, Article IV, Section 1, and 28 U.S.C. § 1738. Such action by the Michigan court presents so serious a challenge to federal law and policy that it is one of a class

of cases in which this Court has repeatedly reviewed decisions that do not finally dispose of the litigation. *Mills* v. *Alabama*, 384 U.S. 214 (1966); *Mercantile Nat'l Bank* v. *Langdeau, supra; Construction Laborers' Union* v. *Curry, supra; Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945); Comment, 73 Yale L.J. 515 (1964).

A reversal of the Michigan decision at this time will be dispositive of the entire case, and all parties will be relieved of a long and burdensome trial. The *Cadman* case was on trial for twenty-three days and went through two appeals. The pretrial proceedings and the trial of the separate issue of res judicata in *Burlington* consumed twenty-one days. One of the United States District Judges in the *Burlington* case noted that the cost of the *Cadman* case was about "half a million dollars" (160 F. Supp. 651, 666). There is no indication that the trial of the present case would be any less lengthy. Furthermore, the decision sought to be reviewed is a breeder of litigation. If allowed to stand, it will surely prompt similar litigation in numerous other places.

To postpone a final determination of this matter until after a trial of the merits and further appeals would unnecessarily burden the courts. As this Court recently stated:

> "Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets". *Mills* v. *Alabama, supra*, at pp. 217-218.

How Federal Question Presented In this Action

Petitioner's federal right to plead the New York State and federal court judgments in bar was specifically asserted in its motion to dismiss in the Wayne County Circuit Court (106a-109a). Of the *Cadman* judgment it was stated:

> "The subject matter of the present action is encompassed and comprehended by the subject matter of the New York action. Accordingly, on accepted principles of full faith and credit and judicial comity, the plaintiffs herein are precluded by the judgment in said action." (107a)

Of the *Burlington* judgment it was stated that the plaintiffs herein are precluded by the judgment in that case "on principles of full faith and credit and judicial comity" (108a).

In addition to the foregoing specification, it is apparent that Petitioner's right to plead the judgments of the New York court and of a United States court sitting in New York as conclusive of this Michigan action could exist only by reason of the full faith and credit provisions of Article IV, Section 1 of the United States Constitution.

Reasons For Granting the Writ

The Michigan Court's denial of full faith and credit to the New York judgment has thrown open for state-by-state determination whether the *Cadman* adjudication will be accorded full faith and credit or whether the departure issue will be retried. Such a laborious and wasteful legal process can be avoided only by this Court's application to the irreconcilable decisions of the highest courts of two states of a constitutional provision that is the very essence of federalism.

The central issue presented in the two cases is exactly the same, the only difference being that in the New York case it was presented in the broader frame of the whole Congregational denomination, while in the Michigan case it was presented in the narrower frame of a single congregation. The underlying question in each case, however, was the same:—whether the union of the two denominations impaired the autonomy of the local church. This is a question of law of national impact that must be determined

on the basis of full faith and credit to the determination first made.

It is not an ecclesiastical question—and the New York court properly so determined—because there is and has been no dispute as to the nature and fundamentals of Congregationalism, the essence of which is the autonomy of the local church. Whether the Basis of Union and constitution of the United Church accord with or depart from the agreed tenets of Congregationalism is a question of law that only a court can determine, as both the New York Court of Appeals and United States District Court for the Southern District of New York held. The New York court decided the question as the District Court and three other state courts have since held.

In any event, there can be no remaining question of whether the departure issue is an ecclesiastical question or of the jurisdiction of the New York court to determine it, because that jurisdictional question itself was raised and determined in the New York court and that determination is res judicata and commands full faith and credit.

The national impact and importance of the full faith and credit question and answer, and the essentiality of a single national answer to the underlying question of the validity of the union, are obvious from the fact that the denomination involved is a nation-wide denomination. The necessity of such a single and final answer has been recognized by the two determinations sought and made in class actions that covered every facet of the relationship of churches and members in the union and by the decisions of the courts of Ohio, Wisconsin and Wyoming that the determinations so made were binding on churches and members everywhere and must be given full faith and credit throughout the United States.

The Michigan Court has decreed otherwise, however, and if its decision is allowed to stand the question of

the relationship of churches and members and of the control of church property would have to be separately resolved in every state of the union, wrecking a denomination with the subversion of a constitutional fundamental.

The nature and great importance of the issue thus presented not only deserves but requires the ruling of this Court.

The Michigan Court Has Denied Full Faith and Credit to the New York Judgment

That the Michigan court has refused to credit the New York decision on the departure question is admitted. It is only necessary to note the assigned reasons for the refusal to see that they constitute no excuse and that the Michigan decision is therefore a denial of full faith and credit to the New York judgment.

The clear cut holding of the New York court is stated in the Michigan opinion—"that the Basis of Union is voluntary and in no way interferes with Congregational faith or manner of worship" (25a). The Michigan opinion refers to this New York holding, however, as "isolated expressions" and "idle phrases" that the New York court "curiously" "added" "for reasons of its own" (34a, 40a-41a), saying that there was "no necessity" for the New York court to get into such "ecclesiastical questions," (38a) and that there was "no jurisdiction" for it to do so because there were no property interests shown to confer jurisdiction to decide "this ecclesiastical question" (35a).

The Michigan court was totally without warrant in thus refusing to give full faith and credit to the New York decision.

It was not even open to the Michigan court to consider any question of the ecclesiastical nature of the departure issue or of the jurisdiction of the New York court to decide it for that question was necessarily determined by the New York decision.

It is apparent, however, that the Michigan court was in error in every one of the grounds on which it sought to justify its denial of credit to the New York decision: in regarding the departure issue as an ecclesiastical question; in stating that there was no necessity for the New York court's deciding the departure issue and treating the New York decision on the point as a dictum; and in holding that there was an absence of property rights involved in the New York court's determination of the departure issue that deprived it of jurisdiction to decide an ecclesiastical question.

The New York court's decision that the departure question was not an ecclesiastical question and was within its power to decide is entitled to full faith and credit

The *Cadman* case squarely presented to the New York courts the question whether the departure issue was ecclesiastical in nature and thereby outside their power to decide. The defendant General Council in its answer raised the jurisdictional question contending that the court had no power to decide the issues presented by the complaint (Mich. Apx. 192a, 204a).

In the New York Cout of Appeals the defendant's brief, under a major point heading, argued the jurisdictional insupportability of the trial court's decision of the departure issue contending that, as noted in the official report of the *Cadman* decision:

> "* * * under the First and Fourteenth Amendments to the United States Constitution and under Section 3 of Article I of the New York Constitution, the court was without jurisdiction over these religious and ecclesiastical matters and without lawful power to make the judgment". (306 N.Y. 151, 157)

The *Cadman* plaintiffs, on the other hand, stoutly maintained in behalf of the Congregational churches and mem-

bers that the court had jurisdiction to determine the departure issue (306 N. Y. 151, 154-156). The Court of Appeals necessarily considered this contention and held that "no ecclesiastical question is presented" (54a). Since its jurisdiction to decide the departure question was thus expressly determined by the New York Court of Appeals, that issue is not subject to reconsideration by the courts of another state. The Michigan Supreme Court was bound to give full faith and credit to the New York courts' determination of its power to decide the departure issue, as well as to its determination of the issue on the merits. *Durfee* v. *Duke*, 375 U.S. 106 (1963); *Milliken* v. *Meyer*, 311 U.S. 457 (1940); *Treines* v. *Sunshine Mining Co.*, 303 U.S. 66 (1939).

As this Court stated in *Milliken* v. *Meyer*, *supra* at p. 462:

> "In such case the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based. *Fauntleroy* v. *Lum*, 210 U. S. 230; *Roche* v. *McDonald*, 275 U. S. 449; *Titus* v. *Wallick*, 306 U. S. 282. Whatever mistakes of law may underlie the judgment (*Cooper* v. *Reynolds*, 10 Wall. 308), it is 'conclusive as to all the *media concludendi*.' "

The departure issue is not an ecclesiastical question

Even if the departure issue were open to reconsideration in the Michigan court and even if rejection of the New York decision were allowable on a showing that the New York court had mistakenly rendered a decision on an ecclesiastical question, warrant for the Michigan decision would still be lacking for there is no showing in the Michigan opinion that the issue is an ecclesiastical question. Whereas the New York opinion explained why no ecclesiastical question was presented, the Michigan opinion has simply stated

the contrary in a conclusionary, unreasoned way. Patently New York was right and Michigan is wrong.

No ecclesiastical question was presented in *Cadman* because there was and is no question of the essence of Congregationalism—the autonomy of the local church in both its spiritual and temporal affairs. There was and is complete agreement on the fundamentals of Congregationalism. The only question on the departure issue was whether the Basis of Union was consistent with or departed from an undisputed standard.*

Such a comparison and determination is distinctly a judicial function and when the question is presented in a litigating forum it can only be determined by a court of law.

Notably, the Michigan court did not undertake to indicate wherein it thought any ecclesiastical question was involved in the issue. Its *ipse dixit* is unsupported, insupportable and clearly erroneous. It affords no basis at all for a refusal to give full faith and credit to the New York judgment.

The New York decision on the departure issue was not a dictum

The Michigan court has erroneously stated that all the New York court decided, aside from its determination that plaintiffs had no interests in the property of the Congregational bodies, was that the Congregational Churches could not be forced into the union; and that having reached that decision the argument was at an end and there was no need

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*Even the New York trial court, which differed from the Court of Appeals on the merits, had held that it was not deciding ecclesiastical questions (199 Misc. 124, 145). The Michigan Supreme Court was thus in error in stating that the *Cadman* trial court found "as an ecclesiastical matter" that the doctrine and polity of the United Church of Christ, as contained in the Basis of Union, reflected in part, at least, a departure from Congregationalism (31a).

to carry on to a decision regarding the impact of the union on those churches that might join (38a).

On the contrary, the *Cadman* case could not have been decided on so narrow a ground because the *Cadman* plaintiffs asserted that the General Council had no right to consummate the union on behalf of those churches desiring to join (52a).

The *Cadman* plaintiffs claimed that the proposed union, as embodied in the Basis of Union, would impair the autonomy of the local churches and thereby be alien to Congregationalism (Mich. Apx. 74a-75a), and that they were therefore entitled to a declaration that the General Council lacked the power and authority to carry out the Basis of Union at all (Mich. Apx. 84a).

The New York court was thus obliged to determine whether the Basis of Union affected the autonomy of the churches in the union and consequently whether the General Council had authority to effect a union that any Congregational church might join without a departure from Congregationalism. The impact of the union on the churches that did join was therefore an essential matter for adjudication.

The adjudication thus made—"that each member church will continue to possess the same freedom of faith and manner of worship as heretofore enjoyed—that there will be no interference in or abridgement of Congregational usage and practice" (54a)—was not something gratuitously "added" or "idle", but was the first, primary and basic ruling of the court.

The Michigan court's lack of excuse in denigrating the New York holding on the departure issue, saying that there was "no necessity" for it, is the more apparent in the light of the decision of the United States District Court in the *Burlington* case, stating that the following matters were "necessarily determined" by the New York Court of

Appeals in concluding that the declarations sought by plaintiff ought not to be made:

> "Under the Basis of Union no Congregational Christian Church, association, conference, or their members, would be subject in respect to either their spiritual or temporal affairs to any control by the proposed United Church of Christ. Freedom of worship and education at present enjoyed would be preserved in the United Church and not abridged. No individual church would be obligated to join the union except through its own voluntary action. Each member church would continue to possess the same freedom of faith and manner of worship as theretofore enjoyed. There would be no interference in or abridgement of Congregational usage and practice. Under these circumstances no ecclesiastical question was presented" (67a).

Property interests were involved in the departure issue presented to the New York court

Even if it could be said that the departure issue is an ecclesiastical question and that the New York judgment is entitled to full faith and credit only if the issue involved property interests, the judgment fully commands that credit, for property interests were involved in the consideration of the departure issue in *Cadman*.

The *Cadman* plaintiffs showed that they were represented in the membership of the General Council (49a), which had been established by the Congregational Christian churches and was made up of representatives of the churches and dedicated to fostering the interests of Congregational Christian churches (Mich. Apx. 72a, 83a). The plaintiffs asserted that the constitution of the General Council, by its established method of electing members to the General Council, placed its control in the Congregational Christian churches (Mich. Apx. 83a). One of the declarations sought by the *Cadman* plaintiffs, on the premise of its claimed showing that the Basis of Union was a

departure from Congregationalism, was that any Congregational Christian churches uniting with the United Church of Christ would "cease to be churches of that [Congregational] fellowship" or have "any connection" with the General Council (52a), and that any Congregational Christian churches which do not join the United Church will "remain the Congregational Christian Churches entitled to all the rights and privileges presently possessed and enjoyed by such churches" (Mich. Apx. 85a).

There was thus involved in the *Cadman* case property rights that were bound up in the question of "departure," separate and apart from the asserted interests of the plaintiffs in the funds of the various Congregational boards and agencies.

In sum, the *Cadman* plaintiffs were asserting on a national scale, in behalf of all Congregational Christian churches that might refuse to join the union, the same claim of a "faithful minority" as the plaintiffs in the Michigan case assert in behalf of the dissenters in the microcosm of a single church. The issue is the same, and the adjudication of that issue in a representative action like *Cadman* is *res judicata*. The Constitution compels that it be accorded full faith and credit.

This Court is the Sole Remaining Forum in Which the National Policy Embodied in the Full Faith and Credit Clause of the United States Constitution Can Be Enforced in This Case of Large National Importance

Where, as in this case, the issue and interested parties transcend state boundaries, the rule of rest embodied in the doctrine of *res judicata* would be meaningless in the absence of the requirements of Article IV, Section 1 of the United States Constitution and 28 U. S. C. § 1738.

Unless the ultimate authority of this Court is brought to bear in this case, there will be no foreseeable end to the

multiplicity of suits across the country involving the same issue but reaching no conclusive result. The litigation could only run a fifty-state course with consequences disastrous to the denomination.

There are approximately 5200 Congregational Christian churches with more than 1,200,000 members. There are churches in each of the fifty states. If the Michigan decision stands, a minority of the members in any of the 5200 churches may litigate the question whether the act of the church in becoming a part of the United Church of Christ violates Congregationalism.

It is appropriate for this Court to consider the effect of the Michigan decision in the perspective of history and of the future. The union of the Presbyterian Church and the Cumberland Presbyterian Church went before twelve state courts of last resort and involved twenty-seven cases (see Zollman, *American Church Law,* [1933] pp. 211-213). The union involved in this case may produce even more litigation if the error of the Michigan court is not corrected.

The courts of five states have already been involved in the "departure" question (105a). Even if actions are not brought in each of the forty-five remaining states, it is obvious that a heavy burden would be placed upon the state courts of this nation if the question can be relitigated again and again. Moreover, the cost to the United Church of Christ in defending its union so many times, and the distraction of its churches, members, resources and energies from the work of the Church to litigating warfare, would inevitably have a grave effect on the work of the church and upon its entire future. The goal of union is to strengthen the church. But the burden of litigating the validity of the union on a state-by-state basis could so diminish the strength of the uniting denominations as to do irreparable injury to both.

The Court may also appropriately take judicial notice of the ecumenical movement for union of the Protestant denominations in the United States. Nine major denominations are involved, of which two have the congregational form of organization. If any questions that might arise as to the validity of any resulting union may only be resolved by multiple law suits at the level of local churches and involving local church property, the legal aspects of union will overwhelm the movement and gravely prejudice the efforts toward unification of all Protestant denominations.

CONCLUSION

For all of the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

LOREN T. WOOD,
Counsel for Petitioner,
No. 60 Wall Street,
New York, New York.

DAVID W. PECK of New York
JOHN T. REDMOND of New York
H. GORDON WOOD of Detroit
LAURENCE D. CONNOR of Detroit
EDWARD W. KEANE of New York
of Counsel

December 7, 1966

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IN THE

Supreme Court of the United States

October Term, 1966

No. 837

MAYFLOWER CONGREGATIONAL CHURCH,
a Michigan corporation,
Petitioner,

against

HELEN JOAN BERKAW, GRACE PFAFF, FRANK C. SMITH and ROY L. STEPHENS, JR.,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

LOREN T. WOOD,
Attorney for Petitioner,
No. 60 Wall Street,
New York, N. Y. 10005.

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Order of Wayne County Circuit Court Granting Defendant's Motion to Dismiss this Action

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

No. 611-604

HELEN JOAN BERKAW, GRACE PFAFF, FRANK C. SMITH and ROY L. STEPHENS, JR.,

Plaintiffs,

v.

MAYFLOWER CONGREGATIONAL CHURCH, a Michigan corporation,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND FOR ACCELERATED AND SUMMARY JUDGMENT, AND JUDGMENT FOR DEFENDANT AND ORDER DISMISSING PLAINTIFFS' ORDER TO SHOW CAUSE

At a session of said Court held in the City-County Building in the City of Detroit, County of Wayne, State of Michigan, on the 13th day of April, A.D. 1964.

Present:

THE HONORABLE MILES M. CULEHAN

Upon the final hearing of oral arguments on defendant's original motion to dimiss said cause and plaintiffs' bill of complaint, and having received the affidavits and exhibits submitted by defendant and plaintiffs, including the records, judgments and opinions of prior litigation hereinafter referred to, and having examined all allegations set

Order of Wayne County Circuit Court Granting Defendant's Motion to Dismiss This Action

forth in plaintiffs' bill of complaint, and the Court having reviewed the Michigan General Court Rules 116 and 117 and determined that defendant's original motion to dismiss which was filed on July 18, 1961, containing the grounds set forth therein would entitle the defendant to both an accelerated and summary judgment under current Michigan General Court Rules, and the Court being fully advised in the premises, and upon motion of Dykems, Wheat, Spencer, Goodnow & Trigg, attorneys for defendant:

The Court finds that the pleadings, affidavits, records, judgments and opinions of prior litigated cases show that there is no genuine issue as to any material fact but only disputed questions of law, and that defendant Mayflower Congregational Church is entitled to judgment on its motion as a matter of law.

The Court further and severally finds that each of the following facts exists without controversy, to-wit:

1. A representative action was heretofore instituted in the Supreme Court of the State of New York, County of Kings, by the Cadman Memorial Congregational Society of Brooklyn and the Cadman Memorial Church, suing on behalf of themselves and other Congregational Christian Churches similarly situated, against Helen Kenyon, as Moderator of the General Council of the Congregational Christian Churches of the United States, as defendant. Final judgment in the said action (hereinafter referred to as the "Cadman case") was rendered in favor of said defendant and against said plaintiffs. The decisions in said action are reported at 195 Misc. 124, 95 N.Y.S. 2d 133, rev'd., 279 App. Div. 1015, 1074, 111 N.Y.S. 2d 808 (2d Dept. 1932), aff'd. 306 N.Y. 151, 116 N.E. 2d 481 (1953).

2. A representative action was heretofore instituted in the United States District Court for the Southern District

Order of Wayne County Circuit Court Granting Defendant's Motion to Dismiss This Action

of New York by the First Congregational Church and Society of Burlington, Iowa, First Congregational Church of Pontiac, Michigan, and others, including Malcolm K. Burton, a minister and member of the First Congregational Church of Pontiac, Michigan, suing on behalf of themselves and all other churches, ministers and members of churches similarly situated, against Evangelical and Reform Church and numerous other defendants. Final judgment in that action (hereinafter referred to as the "Burlington case") was entered in favor of defendants and against plaintiffs, the decisions being reported at 198 Fed. Supp. 677, affirmed 305 F. 2nd 724 (U.S.C.A. 2nd 1962), cert. denied 372 U.S. 918 (1963).

3. On September 29, 1961, the Honorable Lila M. Neuenfelt issued an order dismissing without prejudice plaintiffs' order to show cause why a temporary injunction should not be issued.

4. The property rights involved in this cause exceed $5,000.

The Court concludes as matters of law that:

I. Plaintiffs in the Cadman case represented a class of which plaintiffs in the present action were members and claimed and sought declarations of rights and interests in the subject matter of the litigation which included all the rights and interests asserted by plaintiffs herein. Plaintiffs herein are estopped by said judgment from litigating the issues presented herein and said case is res judicata as to such issues.

II. Plaintiffs in the Burlington case represented a class of which plaintiffs in the present action were

Order of Wayne County Circuit Court Granting Defendant's Motion to Dismiss This Action

members and claimed and sought declarations of rights and interests in the subject matter of the litigation which included all the rights and interests asserted by plaintiffs herein. Plaintiffs herein are estopped by said judgment from litigating the issues presented herein and said case is res judicata as to such issues.

III. Plaintiffs' order to show cause as to why a temporary injunction should not be issued should be dismissed.

IT IS, THEREFORE, ORDERED AND ADJUDGED that defendant's original motion to dismiss, now considered a motion for accelerated judgment and a motion for summary judgment, be and the same hereby are granted, and judgment is hereby entered in favor of defendant and said cause and plaintiffs' bill of complaint are hereby dismissed.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs' order to show cause why a temporary injunction should not be issued is hereby dismissed.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant shall have the right to tax its costs.

MILES N. GULEHAN,
Circuit Judge

Approved as to form

BEAUMONT, SMITH & HARRIS
By ALFRED E. LINDBLOOM
Attorneys for Plaintiffs

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Opinion of Michigan Court of Appeals Affirming Dismissal of Complaint in this Action

STATE OF MICHIGAN

COURT OF APPEALS

DIVISION 1

Calendar # 109

June 21, 1965

HELEN JOAN BERKAW, GRACE PFAFF, FRANK C. SMITH and ROY L. STEPHENS, JR.,
Plaintiffs-Appellants,

against

MAYFLOWER CONGREGATIONAL CHURCH,
a Michigan corporation,
Defendant-Appellee.

Before:

J. H. GILLIS, *P.J.*, McGREGOR and WATTS, *J.J.*

WATTS, *J.*:

Plaintiffs-appellants, the faithful minority of Mayflower Congregational Church, appeal from a decision of the Wayne county circuit court dismissing their complaint on the grounds that all the matters submitted therein have been previously adjudicated against all the classes of parties represented by them in a final adjudication by the New York Court of Appeals in *Cadman Memorial Congregational Society of Brooklyn* v. *Kenyon* (1953), 306 NY 151 (116 NE 2d 481). This is a suit for injunctive relief and a declaratory judgment based upon the alleged

invalidity of the agreement for a church merger or union. The litigation arose after the decision was made by the General Council of the Congregational Christian Churches of the United States to enter into a merger or union with the Evangelical and Reformed Church to form the United Church of Christ. A group representing the Evangelical and Reformed Church and a commission appointed by the General Council met and adopted a document called the Basis of Union which set forth the procedures to govern the proposed merger or union. In 1949, the General Council voted to consummate the merger or union, and a similar decision was made by the Evangelical and Reformed Church.

There was strong opposition to the merger or union by many Congregational churches who had the belief that the proposed United Church of Christ represented a drastic change from the traditional polity of the Congregational Christian Churches. They also were of the belief that the merger or union would destroy or substantially change the nature of congregationalism. Those in opposition to the merger or union contend that the unauthorized action by the General Council commits all members of the Congregational Christian denomination to membership in the United Church of Christ. They further contend that those who choose to remain outside of the United Church of Christ will be deprived of their rights in the assets held by the General Council.

The Cadman Memorial Society of Brooklyn and the Cadman Memorial Church brought suit in 1949 against Helen Kenyon, the Moderator of the General Council. This suit which was filed in the Supreme Court [1] was brought on behalf of themselves and other Congregational Christian Churches similarly situated. The Cadman Church and

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[1] The Supreme Court, the trial court in the *Cadman* case, is comparable to the circuit court of the State of Michigan.

Opinion of Michigan Court of Appeals Affirming Dismissal of Complaint in This Action

Society requested a declaratory judgment that the General Council had no power to consummate the Basis of Union or to unite with the Evangelical and Reformed Church and that no actions taken by the General Council can or will affect the individual Congregational Christian Churches without their voluntary assent; and that those churches which do join the new church will thereby lose all the rights in and control of the various corporations, boards, and instrumentalities which had been established for the furtherance of congregationalism. Cadman also prayed for an injunction halting the merger or union of the churches and the consolidation of the corporations, boards, and agencies with their counterparts in the Evangelical and Reformed Church. The Supreme Court granted Cadman's pleas, declaring that the General Council was powerless to consummate the Basis of Union and enjoining any further actions in that direction. The court specially enjoined the Council from uniting or transferring the corporations, agencies, and instrumentalities of the Congregational Christian Churches or their funds and properties with or to any agency of the Evangelical and Reformed Church or the United Church of Christ. *Cadman Memorial Congregational Society of Brooklyn* v. *Kenyon* (1950); 197 Misc. 124 (95 NYS2d 133). On appeal, the Appellate Division reversed the judgment of the Supreme Court on the law and the facts and ordered plaintiffs' complaint dismissed. 279 App. Div. 1015, 1074 (111 NYS2d 808), (1952). This judgment was affirmed in a full opinion by the New York Court of Appeals, two judges dissenting. 306 NY 151 (116 NE2d 481), (1953).[2]

Approximately eight years after the final judgment in the *Cadman* case, on June 22, 1961, plaintiffs in the instant

[2] Motion for re-argument submitted March 8, 1954, and denied March 11, 1954. 306 NY 851 (118 NE 2d 909).

case filed a complaint in the Wayne county circuit court to quiet title to real and personal property of defendant Mayflower Congregational Church, a Michigan corporation, in plaintiffs and in such other persons who may desire to worship according to the faith and usages of churches commonly called Congregational, and that the court determine that such property may not be used except according to the faith and usages of the churches commonly called Congregational.

Plaintiffs allege that they as members in good standing of defendant church brought suit for the protection of the true rights and interests of the church, of themselves, and of other persons who may desire to worship according to the usages and practices to which the property of the church had been dedicated.

Defendant church was organized in 1930 under Act 53, PA 1901 [3] entitled "An Act for the Organization of Corporate Congregational Churches". The purpose of defendant corporation, as stated in its articles of incorporation which has continued ever since without amendment or change, is to worship and labor together as a church according to the faith and usages of the churches commonly called congregational.

Plaintiffs allege in detail the unique doctrines and practices of the Congregational churches, the formation of the United Church of Christ and how it fundamentally differs from congregationalism. Plaintiffs allege that a majority of the members of defendant church voted on April 30, 1961, to become part of the United Church of Christ. Plaintiffs further allege that to make defendant church a part of the United Church of Christ would work a change in the religious practices not conformable with the origin and historic character of the faith to which the church

[3] CL 1948, 458.301 *et seq.* (Stat. Ann. 1963 Rev. & 21.1881 *et seq.*).

property is dedicated and would divert the property of defendant church to another denomination and violate the rights of the faithful minority and deprive such minority of the use of church property.

Defendant on or about July 19, 1961, filed a motion to dismiss the bill of complaint, claiming that plaintiffs were barred from maintaining the action by reason of two prior adjudications by which the matters raised in the complaint had been finally and conclusively determined against them [4] Defendant also claimed that plaintiffs were estopped by the judgment in these two cases from maintaining the action. The motion further states that the complaint failed to state a cause of action.

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[4] *Cadman Memorial Congregational Society of Brooklyn* v. *Kenyon* (1953), 306 NY 151. Judge Dye of the Court of Appeals, writing the majority opinion of the court, discussed in detail on pages 158-167 the same issues as raised in the instant case. The dissenting opinion written by Judge Froessel is found on pages 167-171.

First Congregational Church and Society of Burlington, Iowa v. *Evangelical and Reformed Church* (US DC SD NY, 1961), 198 F. Supp. 677. District Judge Dimock discussed the same issues as raised in the instant case.

First Congregational Church and Society of Burlington, Iowa v. *Evangelical and Reformed Church* (CCA 2, 1962), 305 F. 2d 724. Circuit Judge Clark discussed the issues which were raised in the instant case.

More recent cases on point are:

Wilson v. *Washington Congregational Church* in the common pleas court, Lucas county, Ohio, #190424 (affirmed by the Court of Appeals of Lucas county and by the supreme court of the State of Ohio in 1963, 175 Ohio St. 264 [193 NE 2d 702]). See 25 Ohio Opin. 2d 35.

Howes v. *First Congregational Church of Sheridan, Wyoming* in the Fifth Judicial District of the State of Wyoming, October 24, 1962.

Hoffman v. *Emley*, in the circuit court, Waukesha county, Wisconsin, June 1, 1964.

Opinion of Michigan Court of Appeals Affirming Dismissal of Complaint in This Action

Defendant's motion was supported by affidavits, one by Loren T. Wood, a member of the Bar of New York, to which were attached many documents. There was also attached to the motion an affidavit of Mr. Taylor, the minister of the defendant church. Plaintiffs also filed affidavits in opposition to the motion to dismiss [5], alleging that the issue of whether the United Church of Christ as formed and effected is a Non-Congregational denomination has never been adjudicated. Further, that the issue of whether the plan of union provided for a new denomination which would be Non-Congregational has not been adjudicated in the *Cadman* case because the court held that the admissions and representations of the General Council, although it was only one of the many parties to the plan of union, eliminated that ecclesiastical question from the case.

In an opinion given on April 13, 1964, Judge Miles N. Culehan of the Wayne county circuit court found:

> "* * * that the pleadings, affidavits, records, judgments and opinions of prior litigated cases show that there is no genuine issue as to any material fact but only disputed questions of law, and that defendant

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[5] The motion to dismiss was brought on for hearing before Wayne county circuit court Judge Lila M. Neuenfelt in September, 1961, and the matter was then argued for several days. On September 29, 1961, a stipulation was entered into by the parties through their respective attorneys and an order entered that the hearing on defendant's motion to dismiss and all further proceedings in the action be suspended and adjourned, to be resumed only when the *Burlington* case, one of the two cases relied on by defendant, then on appeal, would become final. After the *Burlington* case was decided, Judge Neuenfelt did not desire to resume argument of the motion to dismiss because of the pendency in the State of Ohio of a case entitled *Wilson* v. *Washington Congregational Church,* 175 Ohio St. 264 (193 NE 2d 702). When this case was concluded, the instant case was assigned to Judge Miles N. Culehan and the motion was argued before him on April 6 and 7, 1964.

Mayflower Congregational Church is entitled to judgment on its motion as a matter of law.

"The Court further and severally finds that each of the following facts exist without controversy, to-wit:

"1. A representative action was heretofore instituted in the supreme court of the State of New York, county of Kings, by the Cadman Memorial Congregational Society of Brooklyn and the Cadman Memorial Church, suing on behalf of themselves and other Congregational Christian Churches similarly situated, against Helen Kenyon, as moderator of the General Council of the Congregational Christian Churches of the United States, as defendant. Final judgment in the said action (hereinafter referred to as the '*Cadman Case*') was rendered in favor of said defendant and against said plaintiffs. The decision (sic) in said action are reported at 195 Misc. 124 (95 NYS 2d 133), rev'd, 279 App. Div. 1015, 1074 (111 NYS 2d 808) (2d Dept. 1952), aff'd. (1953) 306 NY 151 (116 NE 2d 481).

"2. A representative action was heretofore instituted in the United States District Court for the Southern District of New York by the First Congregational Church and Society of Burlington, Iowa, First Congregation Church of Pontiac, Michigan, and others, including Malcolm K. Burton, a minister and member of the First Congregational Church of Pontiac, Michigan, suing on behalf of themselves and all other churches, ministers and members of churches similarly situated, against Evangelical and Reform (sic) Church and numerous other defendants. Final judgment in that action (hereinafter referred to as the 'Burlington case') was entered in favor of de-

fendants and against plaintiffs, the decisions being reported at 198 F. Supp. 677, affirmed 305 F. 2d 724 (CCA 2, 1962), cert. denied (1963) 372 US 918 (83 SCt 728, 9 L. ed 2d 723).

"3. On September 19, 1961, the Honorable Lila M. Neuenfelt issued an order dismissing without prejudice plaintiffs' order to show cause why a temporary injunction should not be issued.

"4. The property rights involved in this cause exceed $3,000.

"The Court concludes as matters of law that:

"1. Plaintiffs in the *Cadman Case* represented a class of which plaintiffs in the present action were members and claimed and sought declarations of rights and interests in the subject matter of the litigation which included all the rights and interests asserted by plaintiffs herein. Plaintiffs herein are estopped by said judgment from litigating the issues presented herein and said case is res judicata as to such issues.

"2. Plaintiffs in the Burlington case represented a class of which plaintiffs in the present action were members and claimed and sought declarations of rights and interests in the subject matter of the litigation which included all the rights and interests asserted by plaintiffs herein. Plaintiffs herein are estopped by said judgment from litigating the issues presented herein and said case is *res judicata* as to such issues.

"3. Plaintiffs' order to show cause as to why a temporary injunction should not be issued should be dismissed.

"It is therefore, ordered and adjudged that defendant's original motion to dismiss, now considered

a motion for accelerated judgment [6] and a motion for summary judgment,[7] be and the same hereby are granted, and judgment is hereby entered in favor of defendant and said cause and plaintiffs' bill of complaint are hereby dismissed.

"It is further ordered and adjudged that plaintiffs' order to show cause why a temporary injunction should not be issued is hereby dismissed.

"It is further ordered and adjudged that the defendant shall have the right to tax its costs."

On May 11, 1965, this cause came on to be heard as an appeal on questions of law and assignments of error, the complaint, transcript, original papers, and pleadings from the Wayne county circuit court and also upon the briefs and arguments of counsel for plaintiffs-appellants and the defendant-appellee.

This Court finds that there was no genuine issue of fact presented incident to the granting of defendant-appellee's motion to dismiss the cause and the plaintiffs'-appellants' bill of complaint.[8]

This Court finds that no prejudicial error to plaintiffs-appellants occurred during any of the proceedings.

Judgment of the Wayne county circuit court is hereby affirmed. Costs to defendant-appellee.

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[6] See GCR 1963, 116.

[7] See GCR 1963, 117.

[8] Plaintiffs-appellants' bill of complaint requested: (1) the Wayne county circuit court to quiet title to real and personal property of defendant-appellee Mayflower Congregational Church, a Michigan corporation, in plaintiffs-appellants and such other persons who may desire to worship according to the faith and usages of churches commonly called Congregational; (2) that the court shall determine that such property may not be used except according to the faith and usages of churches commonly called Congregational; (3) that defendant-appellee church, its minister, boards, officers, agencies, and other representatives be permanently and perpetually enjoined by a final decree from having or making said church a part of the United Church of Christ or taking any action to that end; and (4) that pending the final decree herein, a writ of temporary injunction be issued of like force and effect.

Opinion of Supreme Court of Michigan Reversing Dismissal of Complaint in this Action

STATE OF MICHIGAN

SUPREME COURT

HELEN JOAN BERKAW, GRACE PFAFF, FRANK C. SMITH and ROY L. STEPHENS, JR.,

Plaintiffs-Appellants,

against

MAYFLOWER CONGREGATIONAL CHURCH, a Michigan corporation,

Defendant-Appellee.

BEFORE THE ENTIRE BENCH

SMITH, *J.*

This suit is the result of a split vote in the Mayflower Congregational Church of Detroit (253 for and 204 against) over whether to become affiliated with the United Church of Christ, a relatively new denomination formed in recent years by a merger of the Evangelical and Reformed Church and a large number of assenting member churches of the Congregational Christian Churches of the United States, an association of autonomous churches.[1] Paintiffs brought this class action as part of the 204-member minor-

[1] Much of the interesting history of the merger is elaborately detailed in other opinions and therefore need not be presented again. See 1 Mich App 252, but especially *Cadman Memorial Congregational Society of Brooklyn* v. *Kenyon* (1953), 306 NY 151 (116 NE2d 481), and *First Congregational Church and Society of Burlington, Iowa* v. *Evangelical and Reformed Church,* (CCA2, 1962) (305 F2d 724).

ity of Mayflower who voted against their particular church becoming a part of the United Church of Christ. In brief, it is plaintiffs' claim that if the Mayflower Church becomes a part of the United Church of Christ, it would effect a change in the organizational structure and practices of the Mayflower Church, contrary to the faith and usages to which the church property has been dedicated. Plaintiffs say that as members of the "faithful minority" —that is, faithful to the historical precepts of congregationalism—they should have title to the church property quieted in themselves and others who, they allege, steadfastly adhere to these precepts. Defendant claims that the central issue of whether the merger resulting in the formation of the United Church of Christ effects a departure from congregationalism has already been decided in class actions (in which, defendant says, plaintiffs were effectively represented) in other cases in other states, all contrary to plaintiffs' claim.

This case comes to us on leave granted plaintiffs from a decision of the Michigan Court of Appeals (see 1 Mich App 252), which affirmed the judgment of the trial court dismissing plaintiffs' complaint on motion. The trial court found that there was "no genuine issue as to any material fact but only disputed questions of law, and that defendant Mayflower Congregational Church is entitled to judgment on its motion as a matter of law."

The trial court based its judgment upon a holding that in two prior class actions in the State of New York, which will be discussed in detail below, plaintiffs therein "represented a class of which plaintiffs in the present action were members and claimed and sought declarations of rights and interests in the subject matter of the litigation which included all the rights and interests asserted by plaintiffs herein." The trial court held, therefore, that plaintiffs were estopped by these two prior judgments from litigat-

ing the issues in the present complaint inasmuch as the matters are "*res judicata* as to such issues", to employ the trial court's terminology.

So much for the brief summary of what the case is about. It will be necessary, however, to examine the pleadings and contentions with added specificity and comprehensiveness because the issues are somewhat technical and rest almost entirely upon prior adjudications in other forums, the holdings of which are in serious dispute between the parties to this action.

First, we examine plaintiffs' complaint (filed June 22, 1961) which, as we have said, was dismissed on motion of defendant. Plaintiffs brought this class action characterizing themselves as part of the "faithful minority" which opposes the Mayflower Congregational Church becoming affiliated with the United Church of Christ. The Mayflower Church is an ecclesiastical corporation organized under Act 53 of the PA 1901 [2] entitled "An act for the organization of corporate Congregational churches." The complaint alleges that a union with the United Church of Christ would work a change in the congregational faith by substituting, in part at least, some measure of ecclesiastical control over member churches contrary to the historic principles of congregationalism which concededly have reposed in each church complete autonomy over its own affairs including, among other things, the power to ordain ministers and to call ministers to pastorates and to determine what are sacraments.

The complaint further alleges that although the Constitution of the new United Church of Christ states that "'the autonomy of the local church in the management of its own affairs is not subject to be abridged or im-

[2] (CL 1948, § 458.301 *et seq* [Stat Ann 1963 Rev § 21.1882 *et seq*].)

paired' [it] *nevertheless does abridge and impair what have been to this time and are today 'its own affairs' of the local church.*" In pointing up this claimed contradiction the complaint further alleges that "(a) Sacraments are dealt with in Sec. 2 of the Constitution where it is stated, United Church recognizes two sacraments, 'Baptism and the Lord's Supper or Holy Communion'. *Thus, this subject is taken out of being one of 'its own affairs' of the local church.* (b) Ordination of Minister is by Sec. 27 declared a 'rite' of United Church * * * through an association. The person desiring ordination must apply to the association (By-Law 109). He is examined by 'The Committee on the Ministry of the Conference and Association' (By-Law 110). He is 'expected' to have studied in a 'theological seminary approved by the Council for Church and Ministry' of the United Church. (By-Law 104). *This is far from the existing practice by which ordination is by a conciliary council convened by the local church,*" reads the complaint. "Under this practice," it continues, "the association may be called to act as the conciliary counsel but if so acts as an invitee and agency of the local church. Under the Constitution and By-Laws the Association acts as the agency of the United Church and with sole and exclusive authority in respect of ordination. (c) Calling of a Pastor is 'by such *procedure* as (the local church) shall determine' and is by the Constitution stated to be one of 'its own affairs' of the local church *but this is limited to procedure and does not extend to the substantive who may be called, where from, and his qualifications,*" says the complaint.

In the same vein, the complaint continues: "The call is declared to be 'a concern of the Church at large' (Constitution 30). A Minister of another denomination can be called only if the association grants him Privilege of Call, 'and this is done only after examination by the Committee on the Ministry of the Conference and Association'. (By-

Law 132). 'Installation or recognition' upon acceptance of a call is a function of the association (By-Law 128). (d) Amendment of the Constitution is dealt with in Sec. 88. *The amending power is solely in the General Synod of the United Church and the Conferences of that church. The local church has no voice in the amendment.* They merely have authority to look at a proposed amendment and possibly to protest against it. There is no limitation in the Constitution on what may be done by way of amendment. While a local church if any amendment were unacceptable to a majority of the members of a local church voting thereon has authority 'to withdraw by its own decision from United Church * * * at any time without forfeiture of ownership or control of any real or personal property owned by it', *nevertheless the rights which are being asserted by this Bill of Complaint commonly referred to as the rights of a 'faithful minority' are completely cut off and extinguished when the local church becomes 'a part of the United Church'.''* (Italics in preceding paragraphs are supplied.)

Defendant countered plaintiffs' complaint with a motion to dismiss supported by affidavits replete with materials from previously adjudicated cases. The thrust of the motion was that matters raised in plaintiff's complaint herein were raised in the two prior lawsuits and ''conclusively determined'' against plaintiffs. The two cases figuring so importantly in this litigation are (1) ''the Cadman case'' (*Cadman Memorial Congregational Society of Brooklyn* v. *Kenyon* [1953], 306 NY. 151, 116 NE 2d 481), and (2) ''the Burlington case'' (*First Congregational Church and Society of Burlington, Iowa* v. *Evangelical and Reformed Church*, [CCA 2,1962] (305 F. 2d 724).

Defendant's motion asserts, among other things, that the Constitution of the United Church of Christ does not and would not interfere with the historical and traditional precepts of congregationalism in any way and that expressly

the autonomy of local churches is preserved. Supporting affidavits contain a substantial discussion of the history of the merger and defendant's view as to the holdings in *Cadman* and in *Burlington*. As aforesaid, the trial court, agreeing with defendant, found no genuine issue of fact and concluded that there was presented only questions of law which the court held had been decided adversely to plaintiffs. Michigan's intermediate appellate court, the Court of Appeals, affirmed without much discussion. See 1 Mich. App. 252, at page 260.

On appeal in this Court, plaintiffs-appellants argue that their complaint "alleges a classic case of a faithful minority seeking to prevent a majority from diverting property dedicated to the use of a church to another denomination or to the support of doctrines fundamentally opposed to the doctrines of such church," citing *Congregational Conference* v. *United Church*, 330 Mich. 561 (1951); *Davis* v. *Scher*, 356 Mich. 291 (1959); and *Immanuel Lutheran Church* v. *Fromm*, 367 Mich. 575 (1962). Plaintiffs say that in both *Cadman* and *Burlington*, upon which defendant relies, the rights of the "faithful minority" were *not* adjudicated. Plaintiffs say also that their complaint raises serious ecclesiastical questions of doctrine and polity of the Untied Church of Christ which have not been determined and could not have been determined in the two cases above cited. They insist that they have a right to go to trial for determination of the "fact question" of "departure", that is, whether the organization and doctrines of the United Church of Christ represent a departure from congregationalism. Defendant say that *Cadman* and *Burlington* have already determined that there is no departure "from the traditional doctrine and practice of the church." Both sides agree that the key issue is whether the New York case of *Cadman* determined this issue of departure.

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What did *Cadman Memorial Congregational Society* v. *Kenyon, supra,* decide? More particularly, did it decide the issue of departure?

Because of the sharp conflict between the parties as to what *Cadman* decided, we think it best to analyze the well-recorded holdings in *Cadman* from the trial court stage through intermediate and final appeals.

CADMAN IN THE TRIAL COURT

The Cadman Church of New York City brought suit in a class action, on behalf of themselves and other Congregational Churches similarly situated, against Helen Kenyon as Moderator of the General Council of the Congregational Christian Churches. Plaintiff Cadman sought various relief against the Council, including injunction and a declaratory judgment. The Cadman Church had voted against the merger and brought action to halt the General Council from proceeding with merger plans, claiming the Council had no power to consummate merger with the Evangelical and Reformed Church. Defendant conceded that the General Council claimed no power to compel a nonassessing congregational church to merge and become a part of the United Church of Christ. Cadman claimed a property interest in various properties and funds of boards and agencies of the General Council of the Congregational Christian Churches. It was the Cadman allegation that such funds were "held or controlled in trust for the benefit" of Congregational Christian Churches, under their principles and practices.

In a lengthy opinion (197 Misc. 124 [95 NYS 2d 133]), the New York trial court found that significant amounts of property, largely money, were in the hands of several "boards, agencies and commissions" of the Congregational

Christian Churches, which were "held or controlled in trust for the benefit, work, interest and activities of the Congregational Christian Churches." The court then discussed with some particularity various provisions of the merger plan known as the "Basis of Union" and concluded that in several particulars the then proposed basis for merger between the Congregational Christian Churches and the Evangelical and Reformed Church would, in the words of the court, constitute a "shift of authority from the [local congregational] church to the United Church of Christ." The court characterized another provision as "a radical departure." Still another provision of the "Basis of Union" was said to constitute a "throttling" of the independence of the heretofore separate autonomous Congregational Churches. A declaratory judgment was then entered in favor of plaintiff Cadman Church declaring that the General Council had "no power or authority on behalf of or in the name of the separate churches to proceed with or carry out and consummate The Basis of Union of the Congregational Christian Churches and the Evangelical and Reformed Church." Concordant declarations were also made by the trial court that the General Council "as a representative body" had no power to merge with the Evangelical and Reformed Church and so on. The defendant appealed.

Cadman in the Intermediate Appeals Court

The appellate division of the New York court reversed on the law and on the facts. In a memorandum opinion by the court (279 App. Div. 1074, [111 NYS 2d 808] [2d Dept. 1952]), the essential holding was stated as follows, p. 1075:

> "In controversies such as this, ecclesiastical or doctrinal questions may be inquired into only insofar at it may be necessary to do so to determine the civil

or property rights of the parties. The civil courts do not interfere with ecclesiastical matters in which temporal rights are not involved. *Plaintiffs have failed to establish any right or interest in or to the funds and other assets which plaintiffs asserted were held in trust, which requires or permits a determination of the ecclesiastical issues presented.* The action was not brought upon the theory that the rights of the plaintiffs or other churches similarly situated, with respect to ownership and control of their individual properties and funds, would be in any way threatened or endangered by the proposed church union complained of. As to such rights and as to funds held under express trusts, there is no dispute between the parties. *As to other funds held by or under the control of the defendant, it was not established that they were received in any other way than as absolute gifts or contributions, to be expended for specific objects or for defendant's usual purposes."* (Emphasis supplied.)

Consistent with its prior stated reasons, the appellate division guardedly ended its opinion in this manner, page 1076:

> "Findings of fact, expressed and implied, inconsistent with the foregoing, *except such findings as were made expressly or by implication, upon questions of doctrine, polity and other ecclesiastical matters,* are reversed. For the reasons heretofore stated, *this court has not considered and has made no determination upon the questions of fact arising upon the issues as to such ecclesiastical matters."* (Emphasis supplied.)

Thereafter, the Cadman plaintiffs appealed the case to the highest court in the state of New York, the Court of Appeals.

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CADMAN IN THE NEW YORK COURT OF APPEALS

After reciting this history of merger proceedings as far as they had advanced to the point of suit, the Court of Appeals analyzed the pleadings and issues in this manner. (See 306 NY 151 [116 NE2d 481]). It stated that "According to its complaint the plaintiff is proceeding upon the theory that the proposed United Church of Christ is and will be so alien and different in structure and polity that fundamental congregational usage and practice will be wholly lost and destroyed. By way of showing such fundamental difference it points out that the United Church of Christ will be a general or authoritative church governed through various ecclesiastical bodies having degrees of sovereignty as distinct from the existing voluntary and advisory associations, conferences, conventions and General Council; that the individual churches and members will be subordinate to control providing, as it does, for a central authority for the engaging and dismissal of ministers, the establishment of a system of church judicatories and for a united or uniform confession of faith in place of the absolute independence and freedom now and heretofore enjoyed in such matters by Congregational Christian Churches" (page 162).

The court then stated that the answer of the General Council conceded that if merger were consummated under the doctrine entitled "Basis of Union" the Cadman Church and any other congregational church would not be subject to any control, in either the spiritual or temporal sphere, by the new United Church of Christ. After discussing further what the answer and concession of the General Council meant, with reference to the autonomy of a congregational church under the merger plan, the court observed as follows, page 163:

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> "In short, there is no power and none is claimed by which the General Council can compel or intends to compel the plaintiff Cadman or any other non-assenting church to join the Union unwillingly or impose upon them a change of faith or doctrine. Union depends on volutary action freely taken by independent autonomous churches * * *. Under these circumstances no ecclesiastical question is presented." Citing *Watson* v. *Jones,* 13 Wall (80 US) 679 (20 L ed 666).

The court returned to a consideration of whether consummation of the proposed merger based upon the document entitled the "Basis of Union" would interfere with any property rights possessed by the Cadman plaintiffs, with particular references to the funds and assets in various boards and agencies allegedly under control of the defendant General Council. It was immediately pointed out that all parties agreed that the funds and property held directly by the Cadman Church were in no way "involved in or threatened" by the proposed union. The same agreement was had with reference to funds held by various agencies, boards and instrumentalities under the General Council under *express* trust, including pension funds. As the court pointed out, the dispute as to whether or not Cadman plaintiffs had any property interest which would give the court jurisdiction or authority to settle ecclesiastical questions attendant thereupon was confined solely to the property and funds in various agencies in which the Cadman plaintiffs claimed a *beneficial interest* under what might be termed an implied trust. Such funds although collected upon a per capita and apportionment basis were nevertheless conceded to be voluntary payments from individual churches or members, that is, with no compulsion from higher church bodies.

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After discussing some of the work of the various boards and agencies such as the American Board of Commissioners for Foreign Missions and the Board of Home Missions, the Pilgrim Memorial Fund and others, the court concluded contrary to the contention of the Cadman plaintiffs, that is, that there was no beneficial interest of plaintiffs in such funds because, as the court found, *the funds were, in effect, donated* by various churches for general corporate purposes and that the donations were voluntary and without restrictions as to use or application.

The court then concluded as follows, p. 167: "having established that the Basis of Union is voluntary and in no way interferes with Congregational faith or manner of worship, and the plaintiffs having failed to establish any direct or beneficial interest in and to the unrestricted funds of the General Council, its various boards, agencies and instrumentalities, and having failed to show that any such general funds are to be used for other than authorized charter purposes, the complaint was properly dismissed on the merits."

THE BURLINGTON CASE

The *Burlington Case*[3] brought in the federal district court for the southern district of New York was a class action brought by another group of nonassenting Congregational Churches, ministers, and members of various churches throughout the country. (In the *Cadman Case*, only the Cadman Church and Society were plaintiffs). The defendants named in this action were not only the General Council of the Congregational Christian Churches

[3] *First Congregational Church and Society of Burlington, Iowa* v. *Evangelical and Reformed Church* (US DC SD NY, 1961), 198 F Supp 677, affirmed (CCA2, 1962), 305 F2d 724, cert denied (1963), 372 US 918 (83 S Ct 728, 9 L ed 2d 723).

but also the Evangelical and Reformed Church and, in addition, all of the major boards and instrumentalities of the Congregational Christian Churches. (In *Cadman*, the moderator of the General Council was the defendant). Again, the nonassenters attacked the Basis of Union as being an illegal document which would impair the historical autonomy of the local congregational church. As to the allegations with respect to property rights, the plaintiffs in *Burlington* sought to show different property interests from the plaintiffs in *Cadman*, particularly certain mortgagors' interests. With respect to such claims, the United States court of appeals, second circuit, summarized the contentions of the Burlington plaintiffs and the court's ruling as follows (p. 729):

> "Since the plaintiffs here, as the district court found, also have made only voluntary contributions, if any, and no further charter violations are shown, the present plaintiffs were clearly members of the class represented by the Cadman Church and Society for purposes of resolving the status of the boards and agencies, and are bound by that decision.
>
> "There remains the request made by the present plaintiffs for a declaration that ministers, members, and nonassenting churches may not be deprived of their rights in the assets, properties, and organizations of the Congregational Christian agencies and instrumentalities. *If they could show some right or interest adverse or dissimilar to that of the Cadman plaintiffs in these assets, etc., the present plaintiffs might prevail in their claim that the Cadman Church and Society could not adequately represent them in the litigation of such an issue. They have, however, made no such showing.* While they point to certain differences of interest, *no showing is made that these*

> *differences give plaintiffs here a claim or right to a declaratory judgment different from that asserted by Cadman.* And while such a separate claim or right might arise if, for example, a mortgage were foreclosed or a pension denied because of refusal to join the United Church of Christ, we cannot on the present record ascertain any imminently threatened interest which the present plaintiffs possess which so differentiates them from the Cadman plaintiffs, in terms of the issues there decided, that the Cadman plaintiffs could not adequately represent *all* the varying nonassenters." (Emphasis supplied.)

Defendants in *Burlington* claimed by way of defense *res judicata* and collateral estoppel, their contention being that representatively the same class and the same issues were before the federal court as were before the New York court in the *Cadman Case.* The federal district court ruled with defendants and on appeal the court of appeals for the second circuit affirmed. The court of appeals said (p. 728):

> "It is our conclusion that as to the issues actually raised and resolved by the New York Court of Appeals in Cadman, the plaintiffs therein and the present plaintiffs form one class having common interests, and all were adequately represented by the Cadman Church and Society. Since no legal issue not determined by Cadman is raised by the present complaint, the judgment of the district court dismissing plaintiffs' complaint must be affirmed."

Positions of the Parties

All the parties agree that this case must turn upon application of a facet of the doctrine of *res judicata.* The disagreement arises from the interpretation of the opinion

of the New York court of appeals in *Cadman* and of the federal court of appeals in *Burlington* and as to what these cases decided.

It is plaintiffs' position that the doctrine of *res judicata* does not preclude them from litigating the departure issue. They reason that the New York court of appeals in *Cadman* made no determination as to the "departure" issue because they had no jurisdiction to do so, there being no property interest shown. Plaintiffs maintain that the court of appeals affirming the appellate division, necessarily affirmed the express finding of the appellate division that no jurisdiction existed to determine ecclesiastical questions, including the question of departure. As to the *Burlington* decision, plaintiffs argue that the federal court of appeals decision is binding upon defendant insofar as it held that it was unclear whether the departure issue was decided in *Cadman* on the merits. Plaintiffs base this contention upon the following from this significant footnote in the opinion of the court of appeals in *Burlington* (p. 729):

> "While it is not wholly clear from the Court of Appeals decision whether it upheld the Basis of Union on the merits or because the question of its invalidity was beyond the cognizance of the civil courts, it would make no difference to resolution of the issues presented here which of these grounds of decision was in fact adopted."

It is the position of defendant that plaintiffs are precluded by *res judicata* from litigating the departure issue. It maintains that the departure issue was decided on the merits contrary to plaintiffs' position, in both *Cadman* and *Burlington*. Defendant argues that the decisions in *Cadman* and *Burlington* were essentially the same as in the instant case, both as to parties and issues, that plaintiffs are

members of the class represented in both prior suits, and are therefore barred by the doctrine of *res judicata* from litigating the departure issue in the present suit. Defendant in answer to plaintiffs' claim that the court of appeals in *Cadman* lacked jurisdiction to determine the departure issue, claims quite to the contrary that the court "*did* have the power to consider and dispose of plaintiffs' allegations regarding departures from Congregationalism involved in the union. The court found not only that the act of uniting was voluntary," says defendant, "but also that the churches would remain free in the United Church. * * * *This adjudication as to the freedom of churches is the critical 'departure issue' in this and the prior actions and has already been adjudicated against present plaintiffs,*" argues defendant. (Emphasis supplied.)

Defendant bases this contention upon the following language from the New York Court of Appeals in *Cadman*:

> "According to its express terms, the Basis of Union recognizes the local church as the basis of organization, and that the conferences, conventions and associations shall 'conduct its business in its own way' by providing that each congregation, association and conference 'has the right of retaining or adopting its own charter, constitution, by-laws and other regulations which it deems essential and proper to its own welfare'; in other words that there will be no intrusion in or abridgement of traditional congregational polity and usage through fellowship of independent autonomous congregations, free of authoritative control." 306 NY 151, 161, supra.

Plaintiffs assert that the language relied upon by defendant in the court of appeals decision in *Cadman* is based upon concessions by the parties, and that concessions cannot be relied upon as a basis for a plea of *res judicata*.

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Defendant answers that under New York law concessions are a proper basis for a plea of *res judicata.* Both plaintiffs and defendant have raised many other issues which need not be considered here. Two amicus briefs were also submitted, which have been both instructive and helpful.

STATEMENT OF ISSUES

The overriding issue presented in this case is whether *res judicata,* or more precisely, the doctrine of collateral estoppel precludes plaintiffs from litigating the departure issue in view of the decisions in *Cadman* and *Burlington.* When employing the term "departure", we mean whether *if* an autonomous congregational church merged with the United Church of Christ, a change in religion would result, insofar as the congregational church was concerned. This is in contradistinction to the issue of whether a particular congregational church could be compelled by the General Council to join the United Church. It is conceded in *Cadman* that there was no such power in the Council. The autonomous congregational churches were conceded to have the authority to vote whether to join or not to join. But, did *Cadman* or *Burlington* decide that if, by majority vote, a particular church of the congregational faith voted to merge with the United Church of Christ and take the church property with it, the tenets and practices of the United Church would be so different from that of congregationalism that so to adhere would constitute a "departure" from congregationalism?

DECISION

First, we are called upon to construe what the court of appeals of New York decided in *Cadman.* Recapitulating,

the trial court in *Cadman* made two findings, essentially: (1) that the Cadman plaintiffs had a property interest in funds in various agencies and boards under control of the General Council; and (2) that, as an ecclesiastical matter, the doctrine and polity of the United Church of Christ as contained in the "Basis of Union" reflected, in part at least, a departure from congregationalism. In reversing the trial court, the appellate division of the New York supreme court reversed both on the law and the facts. The appellate division found, contrary to the trial court, that the Cadman plaintiffs had *no* property interest in the various funds already mentioned above. Finding no property interest in *Cadman*, the appellate division expressly refrained from "questions of doctrine, polity and other ecclesiastical matters." In other words, it declined to discuss the departure issue because it felt that in finding no property interest, the court had no jurisdiction to entertain these ecclesiastical questions. This latter position is made emphatic by the contemporaneous writing of the dissenting justice who wrote: "I cannot agree that the trial court had no jurisdiction to determine this matter" (279 App. Div. 1074, 1076 [111 NYS 2d 808, 811]). He went on to indicate that he thought a property interest had been shown sufficient to confer jurisdiction *to decide* the ecclesiastical question.

In affirming the judgment of the appellate division, the New York court of appeals made it clear that neither the property held directly by the Cadman Church, nor the funds held by the General Council under express trusts, were involved in the suit. The only property in dispute were those funds in which the Cadman plaintiffs claimed a "beneficial interest." As to such funds in possession of the several boards and agencies of the General Council, the court of appeals held that under the circumstances,

"such funds were general gifts for use by the corporations [various boards] in connection with their general corporate purposes." The court held that such "unrestricted contributions" create no proprietary or beneficial interest in the Cadman plaintiffs as would warrant interference by the civil court, unless, the court added, it should appear that their use would be violative of corporate or charter purposes, which was not claimed nor shown. The court of appeals, therefore, found, as did the appellate division, no property interest in the funds had been established by the Cadman plaintiffs.

The paragraph in the *Cadman* opinion of the York court of appeals about which there is so much dispute is quoted in full herewith (pp. 162, 163):

> "The General Council, in its answer concedes that under the Basis of Union the plaintiff and any other Congregational Christian Church, association or conference, or their members, would not be subject in respect 'to either their spirtual or temporal affairs to any control by the proposed United Church of Christ,'—that the proposed expression of faith set out in the Basis is not to be considered a substitution for any confession of faith which may be used in any congregation and 'shall be regarded as a testimony and not as a test' and that freedom of worship and education at present enjoyed 'will be preserved in the United States Church * * * [and] not * * * abridged'. These clear and unequivocal admissions afford assurance that the proposed union will in no way change the historical and traditional pattern of the individual Congregational Christian Church. They serve to remove all fear that any action taken by the General Council leading to a consummation of the Basis of Union will in any

way obligate the individual church to join in the Union except through its own voluntary action. Every possible assurance is given that each member church will continue to possess the same freedom of faith and manner of worship as heretofore enjoyed —that there will be no interference in or abridgment of Congregational usage and practice. In short, there is no power and none is claimed by which the General Council can compel or intends to compel the plaintiff Cadman or any other nonassenting church to join the Union unwillingly or impose upon them a change of faith or doctrine. Union depends on voluntary action freely taken by independent autonomous churches. If any doubt remains, it seems abundantly clear from this record that the very nature of Congregationalism, surviving as it has the vicissitudes of time for nearly four hundred years, assures the integrity of the individual Congregational Christian Church, its faith and independence. Under these circumstances no ecclesiastical question is presented. Cf. Watson v. Jones, 13 Wall 679."

Defendant, in construing the *Cadman* opinion, says that the court of appeals "found not only that the act of uniting was voluntary, but also that the churches would remain free in the United Church * * *. *This adjudication as to the freedom of the churches is the critical 'departure issue'* in this and the prior actions and had already been adjudicated against the present plaintiffs." (Emphasis supplied.)

Plaintiffs in the present action say that this is what *Cadman* means: "Cadman said the Basis of Union was valid because a nonassenting church could not be compelled to join the United Church of Christ. *However, if a*

Congregational church votes to join the United Church of Christ, and these alleged differences amount to a departure from Congregationalism, the church may not take the property into the United Church of Christ. The issue presented in the present action is whether there [sic] differences amount to a departure." (Emphasis supplied.)

Part of the confusion about what *Cadman* means is occasioned by the fact that the highest appellate authority in New York, the court of appeals, added another slightly different reason for its decision than did the appellate division which it affirmed.[4] The appellate division followed the conventional pattern of deciding a church dispute, that is, by determining if a property interest was involved sufficient to confer jurisdiction or power to decide the ecclesiastical question. The appellate division found *no* property interest in the Cadman plaintiffs and, therefore, expressly refrained from ruling on ecclesiastical questions.

However, although the New York court of appeals held with the appellate division on the property issue, it added a point which furnishes the chief bone of contention. As to the property issue, it said: (1) that plaintiffs had "failed to establish any direct or beneficial interest in and to the unrestricted funds of the General Council, its various boards, agencies and instrumentalities"; and (2) that plaintiffs also "failed to show that any such general funds are to be used for other than authorized charter purposes." Curiously, the court of appeals added a finding "that the Basis of Union is voluntary and in no way interferes with Congregational faith or manner of worship." This latter expression, along with other isolated expressions of a similar nature contained in the *Cadman*

[4] This practice is thought not to be unknown in appellate court circles.

opinion, are said to be a decision on the departure issue. When read in conjunction with parts of the opinion, together with the issues before the court on appeal from the appellate division, the only logical conclusion that can be reached, however, is that not only did the court of appeals not consider the departure question but also that it had no jurisdiction or power so to do because there were no property interests shown so as to confer jurisdiction to decide this ecclesiastical question. In this connection, we acknowledge the helpfulness of the brief amicus filed in support of plaintiffs' position.

What the court of appeals in *Cadman* said about the "Basis of Union * * * [being] voluntary" is consonant with its earlier expressions set forth in the highly disputed paragraph from *Cadman* quoted in full above. There it reads: "In short, there is no power and none is claimed by which the General Council can compel or intends to compel the plaintiff Cadman or any other nonassenting church to join the Union unwillingly or impose upon them a change of faith or doctrine." Then the court added emphatically that "Union depends on voluntary action freely taken by independent autonomous churches." It concluded the discussion by saying that "Under these circumstances no ecclesiastical question is presented." Significantly then, the reader was asked to compare (Cf) *Watson* v. *Jones*, 13 Wall (80 US) 679, 20 L ed 666.

Watson is a many faceted case which contains important dicta with reference to congregational churches upon which the *Cadman* court obviously leaned. The holding in *Watson*, however, had to do simply with a church dispute of a different denomination from *Cadman*. The 1871 case of *Watson* found a pro-slavery and an anti-slavery group competing for the use of church property of a particular church in Louisville, Kentucky. The highest judicatory body of the Presbyterian Church, the General Assembly, declared the anti-slavery group to be the "true and lawful

Presbytery of Louisville." The Kentucky court decided against the General Assembly, but was reversed by the United States Supreme Court which held that in a church where congregations are subordinate members of a general church organization, and the highest judicatory body has determined questions of discipline, or of faith, or of ecclesiastical rule, then the civil courts must accept such determination as final.

The important dicta in the case sought to sum up the types of disputes which occurred in religious bodies and to suggest the governing principles for each. The Supreme Court divided the problems into three classifications:

> "1. The first of these is when the property which is the subject of controversy has been, by the deed or the will of the donor, or other instrument by which the property is held, by the express terms of the instrument devoted to the teaching, support, or spread of some specific form of religious doctrine or belief.
>
> "2. The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority.
>
> "3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization" 13 Wall (80 US 679, 722, 723.

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The only applicable portion of *Watson* v. *Jones* which applied in *Cadman* was that part of *Watson* devoted to the second classification of cases, namely those of congregational or other independent, autonomous organizations. Of this type of case, the court in *Watson* had this to say (pp. 724, 725):

> "The second class of cases which we have described has reference to the case of a church of a strictly congregational or independent organization, governed solely within itself, either by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government; and to property held by such a church, either by way of purchase or donation, with no other specific trust attached to it in the hands of the church than that it is for the use of that congregation as a religious society.
>
> "*In such cases where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations.* If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property. If there be within the congregation officers in whom are vested the powers of such control, then those who adhere to the acknowledged organism by which the body is governed are entitled to use of the property. The minority in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact that they had once been members of the church or congregation. This ruling admits of no inquiry

> into the existing religious opinions of those who comprise the legal or regular organization; for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church. There being no such trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who by regular succession and order constitute the church, because they may have changed in some respect their views of religious truth."

It having already been conceded by defendant in *Cadman* and thereupon found by the trial court that the General Council neither claimed nor had authority to compel a nonassenting member congregational church—as was the Cadman Church—to join the United Church, there obviously was no necessity for the New York court to get into such ecclesiastical questions as to whether the United Church represented a departure from the doctrine and polity of the Congregational Christian Churches, including the Cadman Church. In short, the General Council could not compel a nonassenter, it being conceded that union was voluntary. Cadman being a nonassenter had, in a sense, "volunteered" not to become a part of the United Church. Therefore, the argument was at an end. There was no need for the court to delve into various ecclesiastical questions of the "what if?" type, that is, what if Cadman had, by majority vote, decided to affiliate with the United Church? Or what if the other congregational churches elected to affiliate, would the doctrine, polity and practices of the United Church be so different as to constitute a "departure" from historic congregationalism?

The New York court of appeals did not attempt to answer all of these questions to which the Cadman plain-

tiffs sought specific declarations. It merely sought to determine if a union would be voluntary. Once having done that, there was no need, even in such a comprehensive format, to render a declaratory judgment as to whether the doctrine and polity of the United Church represented a departure from congregationalism. If one was not compelled to join, and elected not to join, then one need not surmise what the climate might be if he did.

By referring to *Watson* v. *Jones*, the New York court was indicating its awareness and probable approval of the only relevant portion of the *Watson Case*, that is, that part having to do with congregational type churches. *Watson* said, as to such churches, when schisms develop in a particular local autonomous congregational church over whether one segment of such a church is about to depart from historic precepts and practices, then, in the absence of an express trust imposed upon the use of the church property, the rules that govern are those which apply to non-religious voluntary associations. See 62 Mich. L. Rev. 419, 436 (1963).

Another clarification is in order. The citation in *Cadman* to *Watson* v. *Jones* relative to the law of voluntary associations, appears, clearly from the quote from *Watson*, to refer to the law of voluntary associations as it applies to local church units. As already indicated, in this regard, the *Cadman Case* was simply trying to say that so long as the General Council had no power to compel an individual church to join, then that resolved that particular issue, leaving it to each individual church, *under the rules governing voluntary associations* to join or not to join. Obviously, this had no application to the Cadman plaintiffs because they had already voted *not to join*, but it was instructive dicta aimed at possible future litigants.

Thus, by way of summary of *Cadman*, we may say this: that the New York court of appeals clearly sustained the

finding of the appellate division that the *Cadman* plaintiffs had shown no property interest in the funds held by the various boards and agencies of the General Council. It might have ended there, as did the appellate division, but, for reasons of its own, the court added another point to its rationale in *Cadman*, that is, that the union with the United Church was conceded to be voluntary and that the General Council claimed no power nor had any power to compel a nonassenting church such as Cadman to join the United Church, and thus, under such circumstances, there was no need to discuss alleged doctrinal differences (ecclesiastical questions) between historic congregationalism and the proposed tenets of the United Church as then expressed in the Basis of Union. To our way of thinking, the court was making what was already clear also emphatic!

The unquestioned clincher in all this discussion as to what *Cadman* means is the fact that the almost universal holding of courts in this country is that a civil court has no jurisdiction over ecclesiastical questions unless property rights are involved. *Watson* v. *Jones*, supra; *Everson* v. *Board of Education of Township of Ewing*, 330 U. S. 1 (67 S. Ct. 504, 91 L. ed. 711, 168 A. L. R. 1392); *Zorach* v. *Clauson*, 343 U. S. 306 (72 S. Ct. 679, 96 L. ed. 954); *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94 (73 S. Ct. 143, 97 L. ed. 120); 45 Am. Jur. Religious Societies, Decisions as Conclusive; Supervisory Power of Civil Courts. § 41, pp. 750-752; 76 C. J. S. Religious Societies, Jurisdiction and Power of Civil Courts in General § 86, pp. 873-878; *Rector Church of Holy Trinity* v. *Melish*, 4 App. Div. 2d 256 (164 N. Y. S. 2d 843); *Davis* v. *Scher*, 356 Mich. 291. Having affirmed that Cadman plaintiffs had shown no property interests in Council funds, we have no doubt that the New York court of appeals was keenly aware of its own jurisdictional limitations and thus did not consciously take

up any ecclesiastical questions, any idle phrases suggesting such to the contrary notwithstanding.

The *Burlington Case,* already cited, was brought in the federal district court for the southern district of New York several years after *Cadman* had been concluded in the state courts of New York. It was brought on the eve of merger between a large number of assenting member churches of the Congregational Christian Churches and of the Evangelical and Reformed Church. Plaintiffs in *Burlington* included a number of nonassenting ministers, members of churches, members of boards and agencies, and churches with mortgages held by the Church Building Society, all of the Congregational Christian Churches. Defendants were the Evangelical and Reformed Church, the United Church of Christ, the treasurer of the General Council, and various boards, corporations and agencies of the General Council. Plaintiffs claimed that the added parties constituted a different class from that in *Cadman,* and that their interests in the funds held by or under control of the General Council removed the *Burlington Case* from the rule of *res judicata* as to issues decided in the *Cadman Case.* From a judgment for defendants, plaintiffs appealed to the court of appeals for the second federal circuit. There, the decision was affirmed. The court said "It is our conclusion that *as to the issues actually raised and resolved* by the New York Court of Appeals in *Cadman,* the plaintiffs therein and the present plaintiffs form one class having common interests, and all were adequately represented by the Cadman Church and Society." 305 F 2d 724, 728. (Emphasis supplied.)

The court went on further to say "There remains the request made of the present plaintiffs for a declaration that ministers, members and nonassenting churches may not be deprived of their rights in the assets, properties and organizations of the Congregational Christian agencies and

instrumentalities. If they could show some right or interest adverse or dissimilar to that of the Cadman plaintiffs in these assets, etc., the present plaintiffs might prevail * * *. They have, however, made no such showing." The court then went on further to add this: "And while such a separate claim or right might arise if, for example, a mortgage were foreclosed or a pension denied because of refusal to join the United Church of Christ, we cannot on the present record ascertain imminently threatened interest which the present plaintiffs possess which so differentiates them from the Cadman plaintiffs, in terms of issues there decided, that the Cadman plaintiffs could not adequately represent *all* the varying nonassenters."

The federal court of appeals in *Burlington* clearly planted its decision on the *Cadman Case* as to issues actually raised and litigated by the parties in *Cadman* which the court found to be of the same representative class in *Burlington* as in *Cadman*.

It was also quite clear that the federal court in *Burlington* had some difficulty with the language in the *Cadman Case* with respect to the ecclesiastical issue of departure. The *Burlington* court, having already decided that the parties and issues were essentially the same in *Burlington* as in *Cadman*, deftly handled the question of whether the *Cadman* court had touched upon the ecclesiastical dispute in this manner: "While it is not wholly clear from the Court of Appeals [New York] decision whether it upheld the Basis of Union on the merits *or* because of the question of its invalidity was beyond the cognizance of the civil courts, it would make no difference to resolution of the issues presented here which of these grounds of decision was in fact adopted." 305 F.2d 724, footnote at page 729.

The precise legal problem is one of collateral estoppel and the question may now be asked if the Berkaw plaintiffs in this present action are collaterally estopped from

litigating issues raised in their complaint as to whether or not there would be a departure from congregationalism if the Mayflower Church joined the United Church of Christ? We think the answer is "no".

As to collateral estoppel concerning fact questions, a good statement of the rule is contained in Restatement, Judgments, § 68(2), p. 293:

> "A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action."

Michigan is in accord with this statement. See leading case of *Jacobson* v. *Miller*, 41 Mich. 90, and *Jones* v. *Chambers*, 353 Mich. 674. For the rule of collateral estoppel as applied to questions of law, see Restatement, Judgments, § 70, p. 318.

In view of the fact that neither *Cadman* nor *Burlington* decided the ecclesiastical question of departure, present plaintiffs (assuming they are within a class represented by the *Cadman* and *Burlington* plaintiffs) are not precluded from litigating the issues raised in their complaint.

We are invited to review similar cases decided in the courts of Ohio, Winconsin and Wyoming, which cases apparently reached results opposed to what we now decide. We decline to do so, not only for the reasons fully explaining our decision above, but also because the cases to which we are invited present no opinions giving insight into their judgments. These cases are fully cited in the Michigan Court of Appeals decision at 1 Mich. App. 252, 257. The cases in the Wisconsin and Wyoming courts were decided in the trial courts without opinion or appellate review. The Ohio case, in its brief judgment, seems to turn on other issues. Therefore, no useful purpose would be served by a discussion of any of them.

Opinion of Supreme Court of Michigan Reversing Dismissal of Complaint in this Action

Reversed and remanded for further proceedings. Costs to appellants.

THOMAS M. KAVANAGH
JOHN R. DETHMERS
HARRY F. KELLY
THEODORE SOURIS
MICHAEL D. O'HARA
PAUL L. ADAMS

Concurred with SMITH

BLACK, *J.* (concurring in reversal)

At this yet "summary" stage of a five year old chancery case, I do not care to commit my signature beyond holding that the defendant has failed to sustain the first requisite of its motion to dismiss (filed under former Court Rule 18, § 1 [e]). That requisite was and yet remains proof that the present plaintiffs "are members of the class represented by the plaintiffs therein" (referring to Cadman) and that "The plaintiffs herein, having been members of the class represented in the Federal District Court action, are concluded by the adjudications made therein" (referring to Burlington).*

Since it is not claimed that the present parties plaintiff were parties in the ordinary sense to either of the two mentioned prior actions, defendant's said motion to dismiss required for support something more than a pure conclusion of deposed fact and law; such conclusion being that the present plaintiffs were represented by actual parties to such prior actions and became legally bound in that manner to whatever adjudications as were made therein.

Just why detailed proof, of the alleged fact of representation of these plaintiffs by others in Cadman and Bur-

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* For all of the official citations of Cadman and Burlington, see Justice Smith's opinion, ante at . [sic]

lington, was not offered or supplied below is not explained. The want of such proof calls properly for a negative answer to defendant's counterstated first question and for the withholding of answer to its second question. The two questions appear in the margin.

This case is another example of that imprudent practice which seems to burgeon evermore in our metropolitan trial courts, that is, the practice of summary riddance of cases on summary motion as a means of keeping abreast—at very least—of a backlog that seems to grow faster as dispositions are made. Only last year (*R.R. Improvement Ass'n.* v. *Thomas*, 374 Mich. 175, 187) this Court found it necessary to advise that, "our metropolitan circuits being burdened as they are, it is better to let the work of the circuit get farther and farther behind than to crank a judicial meatgrinder the unjust output of which is simply a great number of 'cases disposed of'." Such advices were given after the Court had noted again the exasperation as well as disservice which stems usually from the cursory disposition of chancery cases without the previous taking of such proof as may fairly be indicated for the *de novo* (should there be an appeal) determination of all pleaded issues (pp. 177, 178):

> "On too many occasions in recent years this Court has found it necessary to remand equity cases for a reason known specially to equity's jurisdiction. See Sternberg v. Baxter, 373 Mich. 8, 18; Falkner v. Brookfield, 368 Mich. 17, 25; Kent v. Bell, 368 Mich.

"(1) Were the plaintiffs in this action members of the classes represented by the class plaintiffs in the two prior actions concerning the union of the Congregational Christian Churches and the Evangelical and Reformed Church?"

"(2) Assuming that the plaintiffs herein were members of such classes, are they now prevented from maintaining this action, as the lower courts held, on principles of *res judicata* and estopped by judgmnt by reason of the judgments in the prior actions?"

443, 451; Kenney v. Village of Novi, 367 Mich. 75, 76, 77, and Crocker v. Crocker, 362 Mich. 6, 8, all of which quote or cite Culy v. Upham, 135 Mich. 131. (106 Am. St. Rep. 388). In Culy v. Upham this regularly quoted passage appears (p. 135):

> " 'We do not wish, by our silence, to seem to approve the procedure adopted in this case. If we had disagreed with the trial judge on the legal proposition discussed in this opinion, we could not have made a final disposition of the case. We should have been forced to remand the record for another hearing in the court below. As a general rule, suits at chancery should be so tried in the lower court that, when they are appealed, this Court may finally dispose of the issue raised by the pleadings.' "

The quoted rule in mind, it is appropriate to say that, defendant's deficient motion to dismiss and orders upholding same having intervened, the very purposes touted in behalf of summary justice have been defeated. What should have been done in recent years, and must yet be done, has not even commenced. It would seem, then, that this Court might serve the administration of justice better by advising the trial bench anew that equity cases are to be handled pertinently as equity cases, just as was recommended sixty odd years ago when *Culy* v. *Upham* was handed down; also that summary disposition of equity cases on technical grounds should be discouraged in favor of enough at least by way of formal hearing as will permit full play of equity's intended jurisdiction. Had this case come to due hearing in accordance with our then recently reaffirmed suggestion (*per curiam,* Crocker, supra), it would in all probability have matured by this time to decretal final judgment.

I would reverse and remand with direction that an order enter in circuit denying defendant's said motion, Plaintiffs should have costs of both appellate courts.

Order of Michigan Supreme Court Reversing Dismissal of Complaint in this Action

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 24th day of August in the year of our Lord one thousand nine hundred and sixty-six.

51283

HELEN JOAN BERKOW, *et al.*,
Plaintiffs and Appellants,

vs.

MAYFLOWER CONGREGATIONAL CHURCH,
Defendant.

Present the Honorable
THOMAS M. KAVANAGH,
Chief Justice.
JOHN R. DETHMERS,
HARRY F. KELLY,
EUGENE F. BLACK,
THEODORE SOURIS,
OTIS M. SMITH,
MICHAEL D. O'HARA,
PAUL L. ADAMS,
Associate Justices.

This cause having been brought to this Court by appeal from the Court of Appeals, and having been argued by counsel, and due deliberation had thereon, it is now ordered by the Court that the judgment of the Court of Appeals be and the same is hereby reversed and the cause is remanded to the circuit court for the county of Wayne for further proceedings in accordance with the opinions filed herein. It is further ordered that plaintiffs may tax costs.

Opinion of the New York Court of Appeals in *Cadman* v. *Kenyon*, 306 N. Y. 151

Cadman Memorial Congregational Society of Brooklyn et al., Suing on Behalf of Themselves and Other Congregational Christian Churches Similarly Situated, *Appellants*, v. *Helen Kenyon*, as Moderator of The General Council of the Congregational Churches of the United States, Respondent.

Argued April 21, 1953, decided December 3, 1953.

DYE, J. This controversy, here in an appeal as of right, concerns the methods and procedures under which the Congregational Christian Churches of the United States and the Evangelical and Reformed Church plan to unite under the name of United Church of Christ. Both are Protestant in faith and polity and both possess a rich heritage from the past.

The Congregational Christian Churches trace their origin to the Reformation in England dating to 1581, and in this country dating to the Puritans in 1620. By tradition and usage the approximately fifty-eight hundred churches in America are independent, self-governing fellowships without any central ecclesiastical control. They have, however, in order to carry on a religious program commensurate with present day requirements, organized themselves into district associations, State conferences and conventions and a General Council national in scope.

The Evangelical and Reformed Church is a Protestant denomination of national scope consisting of congregations, synodical units and an ecclesiastical governing body having jurisdicition and control over such congregations and their members, ministers and organizations. It was founded in 1934 by the union of the Reformed Church in the United States dating to 1725, and the Evangelical Synod of North America dating to 1840. It presently comprises approxi-

mately twenty-eight hundred churches having a membership of over seven hundred thousand persons. The two uniting groups thus aggregate about eighty-six hundred churches with a membership of about one million eight hundred and fifty thousand persons.

The action is in equity. It is brought by the Cadman Memorial Congregational Society of Brooklyn, a New York religious corporation, and the Cadman Memorial Church, an unincorporated religious body affiliated with the Cadman Memorial Congregational Society. The former has custody and control of the temporalities and property and the latter conducts services of worship and other religious activities and meetings in the church edifice located in Brooklyn. For convenience, the plaintiffs will hereinafter be referred to either as "Cadman Church" or "plaintiff".

According to the record, the Cadman Church occupies a unique place among Congregational Christian Churches being not only one of the oldest in America, but one of the largest. It is a union of the former Central and Clinton Avenue Congregational Churches of Brooklyn in which the members of the Simpson Methodist Church have joined for purposes of worship only. Its name honors the memory of a distinguished former preacher, the Reverend S. Parkes Cadman. It is congregational in polity and, like other Congregational Christian Churches, is concededly independent and autonomous and not subject to the control of any other ecclesiastical authority. It is a member of the New York City Congregational Church Association, Inc., and the New York Congregational Christian Conference, Inc., and is represented in the voting membership of the defendant General Council.

The defendant General Council of the Congregational Christian Churches of the United States, sued in the name of its Moderator and Presiding Officer, is an unincorporated association with its principal office and place of business in

New York City. Whenever referred to hereinafter it will be called either the "General Council" or "defendant".

The General Council is a voluntary association, national in scope, having a constitution, by-laws and standing rules. According to its constitution, membership is made up of both laity and clergy representing individual Congregational Churches, local associations and district conferences or conventions and affiliated colleges and theological seminaries, as well as certain other designated groups or classes of persons, such as ex-officio members of the conferences or conventions, representatives of home and foreign missions, honorary members, ecumenical members and certain others, by invitation, the latter enjoying the privilege of the floor but having no vote.

By constitutional pronouncement it stands "for the autonomy of the local church and its independence of ecclesiastic control", "the fellowship of churches, united in district, state and national bodies for counsel and cooperation", "the unity of the Church of Christ". It recognizes such local independence in matters of Christian faith and dogma by declaring that it finds "in the Bible the supreme rule of faith and life, but recognize[s] wide room for differences in interpretation. We therefore base our union upon the acceptance of Christianity as primarily a way of life and not upon uniformity of theological opinion or any uniform practice of ordinances" (Constitution).

The General Council has for its purpose: "to foster and express the substantial unity of the Congregational Christian churches in faith, purpose, polity and work; to consult upon and devise measures and maintain agencies for the promotion of the common interests of the kingdom of God; to co-operate with any corporation or body under control of or affiliated with The Congregational or Christian churches or any of them; and to do and to promote the work of these churches in their national, international, and

interdenominational relations, and in general so far as legally possible to perform on behalf of the United churches the various functions hitherto performed by the National Council for the Congregational churches and by the General Convention for the Christian churches, it being understood that where technical legal questions may be involved the action of the separate bodies shall be secured."

The Basis of Union, with Interpretations constituting the subject matter of this controversy, is the result of several years of study and negotiation between the Commission on Interchurch Relations and Christian Unity representing the General Council (By-Law, No. III, subd. 8) and a committee representing the Evangelical and Reformed Church, its final form being adopted at a joint meeting of the commission and the committee held at Cleveland, Ohio, on January 22, 1947. Thereafter the General Council submitted it to the individual Congregational Christian Churches and State conferences for advice. Notwithstanding that the recommended 75% of the individual churches entitle to vote did not formally approve, nonetheless more than 72% of those voting did approve, as did 90% of the associations and district conferences. Regarding this as substantially affording the advice which it sought, the General Council, at its meeting held in February, 1949, voted (757 for and 172 against) to consummate the plan and so advised the Evangelical and Reformed Church which likewise approved. Such action by the latter church is mentioned by way of interest, although of no consequence in this litigation as it is not a party to the within action.

According to its express terms, the Basis of Union recognizes the local church as the basis of organization, and that the conferences, conventions and associations shall "conduct its business in its own way" by providing that each congregation, association and conference "has

the right of retaining or adopting its own charter, constitution, by-laws and other regulations which it deems essential and proper to its own welfare"; in other words that there will be no intrusion in or abridgment of traditional congregational polity and usage through fellowship of indepedent autonomous congregations, free of authoritative control.

The plaintiff seeks a judgment declaring that the General Council has no power or authority to consummate the Basis of Union on its behalf or other Congregational Christian Churches, and that any Congregational Christion Churches uniting with the proposed United Church of Christ, as proposed in the Basis of Union "will cease to be churches of that [Congregational] fellowship and denomination and cease to have any right or interest in or any connection with the corporations, commission board, agencies and instrumentalities representing or acting for or under the direction and control of the Congregational Christian Churches or the funds and properties thereof" and that any Congregational Christian Churches who do not join with the United Christian Church, will "remain the Congregational Christian Churches entitled to all the rights and privileges presently possessed and enjoyed by such churches" including "the control and benefit of all the corporations, commissions, boards, agencies and instrumentalities which now represent and act for or are under the direction of the present Congregational Christian Churches" and that the United Church and all those who join with it shall have no interest therein.

As an incident thereto it seeks injunctive relief to restrain the General Council, its members and officers, from consummating the Basis of Union and to restrain the General Council, its agencies and instrumentalities from merging or transferring and mingling their funds and assets

with the Evangelical and Reformed Church or with the United Church of Christ.

According to its complaint the plaintiff is proceeding upon the theory that the proposed United Church of Christ is and will be so alien and different in structure and polity than fundamental congregational usage and practice will be wholly lost and destroyed. By way of showing such fundamental difference it points out that the United Church of Christ will be a general or authoritative church governed through various ecclesiastical bodies having degrees of sovereignty as distinct from the existing voluntary and advisory associations, conferences, conventions and General Council; that the individual churches and members will be subordinate to control providing, as it does, for a central authority for the engaging and dismissal of ministers, the establishment of a system of church judicatories and for a united or uniform confession of faith in place of the absolute independence and freedom now and heretofore enjoyed in such matters by Congregational Christian Churches. The plaintiff objects also to the prospect of a constitution for or applicable to Congregational Churches as well as other differences which more fully appear in the Basis of Union. This, in sum, is to say that because of the difference in structure and polity of the two uniting bodies such a union will destroy or materially alter the nature of Congregationalism.

The General Council in its answer concedes that under the Basis of Union the plaintiff and any other Congregational Christian Church, association or conference, or their members, would not be subject in respect "to either their spiritual or temporal affairs to any control by the proposed United Church of Christ"—that the proposed expression of faith set out in the Basis is not to be considered a substitution for any confession of faith which may be used in any congregation and "shall be regarded as testimony and not

as a test" and that freedom of worship and education at present enjoyed "will be preserved in the United Church * * * [and] not * * * abridged". These clear and unequivocal admissions afford assurance that the proposed union will in no way change the historical and traditional pattern of the individual Congregational Christian Church. They serve to remove all fear that any action taken by the General Council leading to a consummation of the Basis of Union will in any way obligate the individual church to join in the Union except through its own voluntary action. Every possible assurance is given that each member church will continue to possess the same freedom of faith and manner of worship as heretofore enjoyed—that there will be no interference in or abridgement of congregational usage and practice. In short, there is no power and none is claimed by which the General Council can compel or intends to compel the plaintiff Cadman or any other non-assenting church to join the Union unwillingly or impose upon them a change of faith or doctrine. Union depends on voluntary action freely taken by independent autonomous churches. If any doubt remains, it seems abundantly clear from this record that the very nature of Congregationalism, surviving as it has the vicissitudes of time for nearly four hundred years, assures the integrity of the individual Congregational Christian Church, its faith and independence. Under these circumstances no ecclesiastical question is presented (cf. *Watson* v. *Jones*, 13 Wall [US.] 679).

We turn then to a consideration of whether the consummation of the Basis of Union will interfere with any alleged property right possessed by the plaintiff in and to funds and assets now held and controlled by the General Council, its boards, agencies and instrumentalities which, it is estimated, aggregate approximately $60,000,000.

The plaintiff alleges that if the Basis of Union is consummated such funds and other assets will "be diverted

from the uses and purposes for which they were set up, created and established and for which they have heretofore been used". The complaint goes on to allege that such diversion will deprive the plaintiffs of representation in the General Council to which they are presently entitled; will deprive them of their interest in the administration of the funds and assets, by mingling such funds with funds and assets of other and unrelated religious organizations, impose upon them liabilities and burdens alien to and different from those now incident thereto and deprive the plaintiff of its lawful right in the application and use thereof.

Before proceeding to a discussion of the merits of the allegation thus made, we note that the parties agree that funds and properties held by the Cadman Church are in no way involved in or threatened by the proposed union; that the funds held by the General Council and any of its agencies, boards and instrumentalities under express trusts, including pension funds, will not be affected (Basis of Union, art. III, § H; art. IV, § L, subd. 1; art. IX, §§ A, C).

The dispute concerns rather the appellants' alleged beneficial interest in general funds belonging to and used by various boards and agencies in carrying on their respective functions. Such funds are raised through per capita and apportionment systems applicable to individual churches and their members. No individual church or member is required to contribute anything—it is entirely voluntary and, in fact, the Cadman Church for years has refused to pay per capita dues on the ground that it is not obliged and cannot be compelled to do so. It has, however, concededly contributed other amounts "in lieu of" the per capita assessment. The apportionment plan is also entirely voluntary and benevolent. The general practice, we are told, is for the individual churches to send their voluntary general contributions to the State Conference and the funds which

the State Conference does not use are turned over to the General Council, its agencies, boards and instrumentalities, who use such funds in carrying on a world-wide program of Christian outreach. This has many aspects and to assure successful results, the work in its various categories is done through boards, agencies and instrumentalities created for the express purpose of performing a specified phase of the program. They are usually corporate in form and while the name "Congregational" appears in most of such agencies, their express purposes are nonetheless very broad and in no way limited to furthering any particular religious viewpoint, dogma or confession of faith. For instance, the American Board of Commissioners for Foreign Missions (a Massachusetts corporation) has for its purpose the extension of Christ's Kingdom abroad, without making any reference to Congregational Christian Churches, to the General Council or any denomination whatsoever but, on the contrary, and it is significant here, it may unite with others in the manner provided in the by-laws including "election by a council, synod * * * representing any churches * * * located within the United States".

The Board of Home Missions of the Congregational and Christian Churches (a corporation chartered in New York, Connecticut and Massachusetts) is much the same. It too may carry on its work "either directly or through other corporations having similar objects in the United States and in other countries". We may note also that the Congregational Board of Ministerial Relief (a Connecticut corporation organized by Special Act in 1885 and amended in 1933) has for its purpose the relief of needy Congregational ministers. In addition, its benevolences are available to "ministers of other churches affiliated, merged or consolidated with the Congregational Churches and after their decease for the benefit of their needy families, in accordance with resolutions and declarations adopted or made, from time to

time, by the General Council * * * or by any body which may succeed to the present functions of that council; and said corporation may cooperate with any other corporation or body which is under the charge and control of the Congregational and Christian churches in the United States or of churches at the time affiliated with them".

In fact the Corporation for the General Council of the Congregational Christian Churches of the United States, a financial corporation organized under a Special Charter given by the Legislature of Connecticut for the purpose of providing and administering a pension fund for retired Congregational ministers (its principal asset being the Pilgrim Memorial Fund, a trust which all agree will not be affected by the proposed union), provides that: "If hereafter any other body of Christians shall have united with the Congregational and Christian churches by union, merger, affiliation or otherwise, effected by or with the consent of said General Council, said Corporation may exercise its powers for the use and benefit of the churches or other institutions of the united or merged denomination, or of such affiliated body." Other corporations may be mentioned such as The American Missionary Association, The Congregational Home Missionary Society, The Congregational Church Building Society and The Congregational Sunday School Extension Society, all New York corporations, The Congregational Education Society, a Massachusetts corporation, The Annuity Fund for Congregational Ministers and The Retirement Fund for Lay Workers, both New Jersey corporations, but need not be discussed more than to say that in most instances their charters give them very broad and general powers which would not be violated by uniting with any other similar charitable and religious organization. The principle of voluntariness has long been a motivating force in Congregational fellowship.

Notwithstanding that the above-listed boards and agencies are corporations authorized and existing under

the laws of several different States, the plaintiffs nonetheless contend that such boards and agencies have in fact no separate and independent status because their boards of trustees, officers and administrators are drawn from the membership of the General Council and that their activities are, for all practical purposes, controlled and supervised by the General Council—that diversion of their funds and assets and mingling of same with the funds of others is an interference to its detriment in a property interest belonging to the Cadman Church and other nonassenting churches. This, however, is not established in fact as the proof shows and, it is conceded, the Cadman Church has not contributed any funds, except as we have seen, for other than a general corporate purpose and these voluntarily and without restriction as to use or application. Under such circumstances it must be assumed that such funds were general gifts for use by the corporations in connection with their general corporate purposes. Such voluntary unrestricted contributions for a general charitable and religious purpose create no proprietary or beneficial interest warranting the civil courts in interfering in their expenditures so long as it appears that such use and application is not violative of charter purposes. As this court has previously observed: "Gifts to religious and charitable corporations to aid in carrying out the purposes for which they are organized, whether by expending the principal of a bequest, or the income of a bequest to be invested in perpetuity, do not create a trust in any legal sense" (*Bird* v. *Merklee*, 144 N. Y. 544, 550; see, also, *Wetmore* v. *Parker*, 52 N. Y. 450; *Johnston* v. *Hughes*, 187 N. Y. 446).

Furthermore, and we repeat, all agree that no trust funds or assets, including pension funds, held by or under the control of the General Council or any board or agency or by any non-asserting church are in any way affected by the proposed union. Absent a showing that any fiduciary

obligation imposed by the charters or certificates of incoration of any board or agency will be violated or that such violation is imminent or threatened, there is no basis or necessity for a declaratory judgment enjoining the General Council in any respect, nor may any restraining order issue against the various corporate boards and agencies, the Evangelical and Reformed Church or the United Church of Christ, as they have not been made parties defendant and are not before the court. Such a remedy is available only in an appropriate action, which this is not (Civ. Pract. Act, §§ 193, 473; *Manhattan Stor. & Warehouse Co.* v. *Movers & Warehousemen's Assn.*, 289 N. Y. 82; *Ivory* v. *Edwards*, 304 N.Y. 949). On this record, the proof having established that the Basis of Union is voluntary and in no way interferes with the Congreational faith or mnaner of worship, and the plaintiffs having failed to establish any direct or beneficial interest in and to the unrestricted funds of the General Council, its various boards, agencies and instrumentalities, and having failed to show that any such general funds are to be used for other than authorized charter purposes, the complaint was properly dismissed on the merits.

The judgment appealed from should be affirmed, without costs.

FROESSEL, J. (dissenting). This action involves a so-called proposed Basis of Union between the Congregational Christian Churches of the United States and the Evangelical and Reformed Church. Plaintiffs-appellants seek to prevent the proposed union, or, failing in that, ask for a declaratory judgment as warranted by the pleadings and admissions of the parties.

As of January 1, 1949, 54%, or 3,120, of a total of 5,715 Congregational Christian Churches in the United States voted favorably upon the proposal (72.77% of the *churches voting* gave their approval); 1,433 did not vote, and 1,162

churches voted "No". Following such approval, defendant, General Council of the Congregational Christian Churches of the United States, deemed itself authorized to proceed with the proposals outlined in the so-called Basis of Union with Interpretations, on its behalf as well as on behalf of those who might become parties to it, although it was originally recommended that it do so if 75% of the churches voting approved.

While professing a desire to preserve scrupulously the free autonomy of the individual churches, "all trust funds" and "the property rights of all bodies", the General Council nevertheless circulated an Analysis of the Basis of Union (under which a general merger of the corporate agencies and instrumentalities of both united churches is planned), in which it is stated that a church which votes against the Union "would naturally, give up its *rights* [emphasis in original] in * * * United Church" organizations and agencies, "though, if it desired, it could continue to have such relationships with such bodies as would be possible to a church not being a member of the denomination", whatever that may mean.

With this immediate background, and the historic setting of the Congregational Christian Churches of the United States over a period of upwards of three centuries, as outlined in the prevailing opinion, plaintiffs applied to the Supreme Court for a declaratory judgment setting forth the declarations which they desired, and for injunctive relief. Defendant in its answer asked for a dismissal of the complaint, or, in the alternative, for a declaratory judgment setting forth the declarations which it desired. After a lengthy trial, Special Term, in accordance with section 473 of the Civil Practice Act, which provides that said court "shall have power in any action * * * to declare rights and other legal relations on request for such declaration", entered a judgment embodying in large measure the very

declarations which the parties asked for, and in addition thereto gave to plaintiffs broad and sweeping relief. The Appellate Division, though declaring in the prevailing opinion certain rights of the parties, reversed Special Term and dismissed the complaint, with costs against plaintiffs in the sum of upwards of $6,000.

While, in my opinion, many of the declaratory provisions in the Special Term judgment were clearly warranted, I agree that the entire relief granted was too broad, and that its restraining provisions were not warranted. I also agree that it erred in declaring that defendant had no power to proceed with or carry out the proposals called for in the Basis of Union. In my judgment, however, defendant may not in so doing impinge upon the rights of plaintiffs.

The Appellate Division, in reversing Special Term, held (1) that "civil courts do not interfere with ecclesiastical matters in which temporal rights are not involved"; and (2) that as to plaintiffs' "control of their individual properties and funds", and "as to funds held under express trusts [which would include pension funds], there is no dispute between the parties". (3) "As to other funds held by or under the control of the defendant", it assumed to declare that plaintiffs had not shown any rights therein, but nevertheless held that "there should have been no declaration of the rights of plaintiffs with respect to the funds and assets held by the corporate societies and agencies" until the latter were brought before the court as parties. (4) Finally, it held that a "declaratory judgment serves a legitimate purpose only" when the parties affected are before the court; yet it failed to approve Special Term's declaratory judgment even with respect to the very matters concerning which, as between themselves, both parties had asked for a declaration. (279 App. Div. 1074, 1075, 1076.)

We are all in accord that there is no ecclesiastical question in this case. The parties agree as to the independence

and autonomy of the local Congregational Christian Church in all matters temporal and spiritual, and that the Association, through voluntary independent organizations, was devised for fellowship and co-operation, but without ecclesiastical authority. The local Congregational Church, unlike most other religious organizations, is subordinate to no higher earthly spiritual authority. The General Council is a voluntary unincorporated association, and concededly is without "power or authority to enter into or to make any contract or commitment of any kind binding upon plaintiff Church".

The Appellate Division has properly held that plaintiffs may not be disturbed with respect to (1) ownership and control of their own properties, nor (2) as to funds held under express trusts, which include pension funds.

As to any unexpended funds contributed by plaintiffs to defendant or to the Corporation for the General Council or to the Congregational Board of Ministerial Relief, defendant agreed at the close of the trial that such moneys may be used only for the purposes authorized by its charter or constitution and by-laws *as they exist at the date of the trial court's decree.*

We also agree that there should have been no declaration either by Special Term or the Appellate Division as to the rights of plaintiffs with respect to the funds and assets held by the various corporate societies and agencies until the latter were brought before the court as parties. As to such funds, which we are told amount to upwards of $60,000,000, plaintiffs may well have rights in the way of continued service and otherwise, by reason of their contribution of many tens of thousands of dollars over the years. Whatever these rights—which may only be determined when the necessary parties are before the court—they may not be stripped from plaintiffs simply because they choose to remain independent Congregational

Churches. Good faith and Christian understanding on both sides should solve such problems as they actually arise; should such understanding not come to pass, plaintiffs may then urge whatever rights they claim to have, and which they assert are impinged upon, in an appropriate action with all necessary parties before the court. Becuse we cannot pass upon them at this time is not to say that they have no rights.

For these reasons, I am of the opinion that the Appellate Division erred in dismissing the complaint. This has been a long trial. As a result of the institution of this action, and in the course of the trial, concessions were made resolving many of the issues between the parties. To preserve these concessions and requested declarations—as Special Term has—is a function of a declaratory judgment, and clearly within the scope of Special Term's powers. The Appellate Division recognized in its opinion that a declaratory judgment serves a legitimate purpose when the persons affected are before the court. Here plaintiffs and defendant are before the court, and a declaratory judgment as to their respective rights, between themselves, is clearly authorizd. Plaintiffs should not have been denied any relief whatsoever, but those provisions of the Special Term judgment which both the Appellate Division and the members of this court recognize as proper should have been permitted to stand.

The judgment of the Appellate Division should be reversed and the judgment of Special Term modified as follows:

The first two ordering paragraphs should be stricken.

As to the third ordering paragraph, subdivisions 1 and 2 should be stricken and the following substituted therefor: "The defendant, The General Council of the Congregational Christian Churches of the United States, has the power and authority to proceed with and carry out the

proposals in the Basis of Union for itself and for those who may become parties to it, without the approval of the plaintiffs or those churches for whose benefit the plaintiffs claim to be suing."

In the same third ordering paragraph, subdivisions 3, 4, 5, 6 and 7 should be allowed to remain, for this relief was asked for in part by plaintiffs in paragraph 3 of their prayer for relief, and consented to altogether by defendant in paragraphs CII-CV of its prayer for relief.

Subdivision 8 of the third ordering paragraph should be stricken.

A further subdivision should be added to said third ordering paragraph embodying paragraph CVI of defendant's prayer for relief.

An additional declaration should also be added to conform to defendant's motion made at the close of the trial to add paragraph CVII(a) to its prayer for relief, reading as follows: "Declaring that any unexpended funds contributed by the plaintiff to the defendant or to the Corporation for the General Council or to the Congregational Board of Ministerial Relief, may be used only for the purposes authorized by its Charter or Constitution and By-laws as they exist at the date of this Court's decree."

The fourth ordering paragraph granting injunctive relief should be stricken in its entirety.

Subdivisions 1 and 2 of the fifth ordering paragraph should be deleted; subdivision 3 thereof may stand.

The sixth, and last, ordering paragraph should be modified by substituting for the words "the plaintiffs" the words "either party".

No costs should be awarded here inasmuch as both parties asked for a declaratory judgment.

LEWIS, Ch. J., DESMOND and FULD, JJ., concur with DYE, J.; FROESSEL, J., dissents in opinion in which CONWAY, J., concurs.

Judgment affirmed. [See 306 N. Y. 751, 792, 851.]

Opinion of United States District Court, Southern District of New York in First Congregational Church of Burlington v. Evangelical and Reform Church (198 Fed. Supp. 677)

FIRST CONGREGATIONAL CHURCH AND SOCIETY OF BURLINGTON, IOWA et al., Plaintiffs, v. EVANGELICAL AND REFORMED CHURCH et al., Defendants, John T. Beach, as Treasurer of the National Council of Congregational Churches et al., added Defendants. United States District Court, S. D. New York, March 31, 1961.

DIMOCK, *District Judge.*

In this case I have directed a separate trial of the issue of res judicata and collateral estopped hereinafter for brevity referred to as "res judicata") with the thought that it might possibly eliminate the necessity for a trial on the merits. Defendants have rested in their presentation of their affirmative case in support of their defense of res judicata. Plaintiffs have moved for a ruling that defendants have not made out a prima facie case. That motion is before me.

The case is one of great importance to large numbers of people and involves venerated and deep seated convictions. A large segment of the followers of the Congregational faith sincerely believe that a pending merger with the Evangelical and Reformed Church will create a body lacking the fundamentals of Congregationalism and will devote to an alien purpose large sums which have been piously accumulated for the extension of the Congregational idea.

It was but natural that the proposed merger should be fought through the state courts with all of the skill and determination at the non-assenters' command. It is no less natural that, having been unsuccessful in the state courts, people so deeply convinced of their duty to their faith should attempt to obtain a different result

in this court. Their motives are entirely praiseworthy.

Those who favor the merger, however, have the same duty to defend their belief that it will advance the Christian ideals that they cherish no less deeply than do the non-assenters. Their motives in maintaining that the matter has been settled by the New York Court of Appeals are no less high.

The first task of the court is to pass upon this plea that the matter has been laid at rest by a court decision. The consideration of the merits of the controversy between the parties has not been reached in this court. Upon this application this court cannot even consider the correctness of the decision of the New York Court of Appeals. Such is the effect of a decision on the merits by a court of competent jurisdiction that those whose rights have been lawfully submitted for adjudication are bound by the result even if they can demonstrate to all the world that the facts were other than as determined by the court or that its reasoning was faulty.

[1] The purpose of law suits is to get things decided. The inquiry here is whether the law suit in the state courts attained this purpose. If it did, this court cannot re-examine the questions presented to the state courts. Only if those questions are still open will the correctness of the decision of the New York Court of Appeals be a factor to be considered. With that in mind I shall proceed to a consideration of the question whether the plaintiffs in this case are prevented by the state court decision from presenting the questions on which they seek a decision.

In considering the application for a separate trial of the issue of res adjudicata I reached tentative conclusions as to the interpretation and effect of the decision by the New York Court of Appeals in Cadman Memorial Congrega-

tional Soc. of Brooklyn v. Kenyon, 306 N.Y. 151, 116 N.E.2d 481. These conclusions have been confirmed by the further study and argument involved in the hearing of this application. It will be a convenience to have those conclusions reiterated here.

[2] The matters of fact and law necessarily determined by the Court of Appeals in reaching its conclusion that the plaintiffs were not entitled to the declarations and injunctive relief sought constitute adjudications binding upon the litigants and those who, under the rules of law applicable to res judicata, were represented by the parties.

The following matters were necessarily determined by the Courtof Appeals in concluding that the declarations sought by plaintiffs ought not to be made.

Under the Basis of Union no Congregational Christian Church, association, conference, or their members, would be subject in respect to either their spiritual or temporal affairs to any control by the proposed United Church of Christ. Freedom of worship and education at present enjoyed would be preserved in the United Church and not abridged. No individual church would be obligated to join the union except through its own voluntary action. Each member church would continue to possess the same freedom of faith and manner of worship as theretofore enjoyed. There would be no interference in or abridgement of Congregational usage and practice. Under these circumstances no ecclesiastical question was presented.

The various agencies, boards and instrumentalities holding and administering funds were agents of the General Council. Funds held by them under express trusts were not affected by the proposed union. Contributions in other forms created no proprietary or beneficial interest war-

ranting the civil courts in interfering with their expenditure so long as it appeared that there was no violation of charter purposes.

Besides denying plaintiffs' prayer for declaratory relief and a restraining order against the General Council, the Court of Appeals remarked "nor may any restraining order issue against the various corporate boards and agencies, the Evangelical and Reformed Church or the United Church of Christ, as they have not been made parties defendant and are not before the court." No statement was made that such determinations as were made were not binding as to the parties not before the court. In this respect my construction of the decision of the Court of Appeals differs from that of Judge Dawson in his denial of the motion for summary judgment, D.C., 160 F. Supp. 651.

Even if these necessary determinations made by the Court of Appeals were wrong or were made upon concessions of the plaintiffs rather than upon evidence or were made on no evidence at all they are still binding upon the parties to the litigation and those whom they represented.

Two questions thus arise here: Were plaintiffs in this case represented in Cadman? and, Are any new questions presented? If plaintiffs in this case were not represented in Cadman, then the whole field is open. If plaintiffs here were so represented and there are new questions, then those new questions are open.

Defendants offered in evidence the record and briefs in the Cadman case and a few exhibits. Plaintiffs then moved on defendants' case to dismiss the defense of res judicata. In the consideration of a separate trial of the defense of res judicata, the court is faced with the difficulty of determining what the plea is supposed to be a

defense to. Pleadings are so unimportant in modern practice that one cannot assume that a plaintiff's proof would follow his complaint. To cut the Gordian knot, documents were admitted as court exhibits which the court deemed would, with certain specifications of plaintiffs' claim that had been given, supplement the complaint so as to give a picture of plaintiff's case sufficiently complete to test the validity of the defense of res adjudicata.

Plaintiffs have prepared a statement of the declarations that they want and the parties have briefed the questions presented, arranging their arguments by reference to that statement. I shall follow that lead and decide the various questions as they arise.

Requested Declarations I and II as to Specific and General Provisions of the Agreement

These ask that the "Basis of Union" with "Interpretations" be declared illegal, invalid and void.

As above stated, the State Court of Appeals held to the contrary. The only question, therefore, is whether there are parties here who were not represented in Cadman. The Cadman plaintiffs were a religious corporation which had custody and control of the temporalities of the Cadman Church and an unincorporated society which had charge and control of its spiritual and religious functions.

I ruled in the course of the trial that the members of the unincorporated society who were plaintiffs represented the members of all other Congregational churches. The specifications do not indicate that any other Congregational Church has interests so substantially different from the Cadman Church as to give it the right to a private

determination of the validity of the proposed union. Ministers in general have the same interest as other members of the churches and so do members of the General Council and members of the boards and agencies.

The Evangelical and Reformed Church and the United Church of Christ which have been added as defendants have the same interest as the Cadman General Council which defended the Cadman case and thus are entitled to claim the benefit of the Cadman decision as they do here even if they could not be forced to accept its burdens. Israel v. Wood Dolson Co., 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97; Gart v. Cole, 2 Cir., 263 F.2d 244.

That leaves the problem of the special interest of ministers in the pension funds. Plaintiffs' Court of Appeals brief in Cadman complained of the lack of protection of the rights of the ministers of non-assenting churches and discussed the interest of both churches and ministers in pension and retirement funds. The Court of Appeals referred to these funds in the opinion, 306 N.Y. at pages 165-166, 116 N.E.2d 481. Thus it is clear that the matter was covered by the decision in favor of the proposed union. The question remains, however, whether the ministers who had contributed to thef und were represented. In my opinion they were. The Cadman Church had its own interest in the funds as plaintiffs in the Cadman case showed by introducing evidence that churches, in addition to making contributions to the Annuity Fund, paid their ministers' dues in the Fund.

A similar question arises with respect to mortgages on churches and held by the Church Building Society. The Cadman Church was not subject to such a mortgage but one of the plaintiffs here is. The matter was raised in the Court of Appeals and the plaintiffs there pointed out that

the form of mortgage provided for payment with back interest if a church ceased to be in fellowship with a Congregational and/or Christian Association recognized by the General Council and said that there was danger that such a mortgage could be made due and payable. The matter was thus passed upon but again the question remains whether the Cadman plaintiffs reprseented the churches that had mortgages on them. All Congregational Churches had the right to borrow under such mortgages so that the question was one of interest to the Cadman Church. The mere fact that other churches had still greater interest in the question does not entile them to a separate determination.

REQUESTED DECLARATIONS III CONCERNING THE RIGHTS, STATUS AND LEGAL RELATIONS OF CHURCHES, MINISTERS, MEMBERS, BOARDS, AGENCIES AND INSTRUMENTALITIES.

Here plaintiffs, under no less than twenty-five heads, ask for what they characterize as "Declarations concerning the rights, status and legal relations with churches, ministers, members, boards, agencies and instrumentalities". Under this head plaintiffs seek declarations substantially like those set out by the New York Court of Appelas in its opinion on page 161 of 366 N.Y., at page 484 of 116 N.E.2d in the following words:

> "The plaintiff seeks a judgment dcelaring that the General Council has no power or authority to consummate the Basis of Union on its behalf or other Congregational Christian Churches, and that any Congregational Christian Church uniting with the proposed United Church of Christ, as proposed

> in the Basis of Union 'will cease to be churches of that [Congregational] fellowship and denomination and cease to have any right or interest in or any connection with the corporations, commission board, agencies and instrumentalities representing or acting for or under the direction and control of the Congregational Christian Churches or the funds and properties thereof' and that any Congregational Christian Churches who do not join with the United Christian Church will 'remain the Congregational Christian Churches entitled to all the rights and privileges presently possessed and enjoyed by such churches' including 'the control and benefit of all the corporations, commissions, boards, agencies and instrumentalities which now represent and act for or are under the direction of the present Congregational Christian Churches' and that the United Church and all those who join with it shall have no interest therein."

Such declartions were made at Special Term in the Cadman case but the Appellate Division dismissed the complaint on the merits. The Court of Appeals affirmed the judgment dismissing the complaint on the merits. It did so, because, as stated on page 167 of 306 N.Y., on page 481 of 116 N.E.2d, the proof had established that the Basis of Union was voluntary and in no way interfered with the Congregational faith or manner of worship and the plaintiff had failed to establish any direct or beneficial interest in the unrestricted funds of the General Council "its various boards, agencies and instrumentalities" and had failed to show that any such general funds were to be used for other than authorized charter purposes.

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The Court of Appeals, in a previous part of the opinion at page 163 of 306 N.Y., at page 485 of 116 N.E.2d, had determined that, because union was voluntary, it would not abridge Congregational usage and no ecclesiastical question was presented and, in the next paragraph, began, "We turn then to a consideration of whether the consummation of the Basis of Union will interfere with any alleged property right possessed by the plaintiff in and to funds and assets now held and controlled by the General Council, its boards, agencies and instrumentalities * * *."

Since the Court of Appeals, to affirm a dismissal of the complaint on the merits, evidently needed to do no more than to find that the Basis of Union was voluntary and that it did not interfere with Congregational usage and that the plaintiffs had no interest in the funds of the General Council and the Boards and that the funds were not to be used other than for charter purposes, those findings must have been conclusive against the complaint's prayers for declarations as to the respective rights of the joining and non-joining churches and ministers, boards, agencies and instrumentalities. It cannot be said that the refusal to make such a declaration was merely the exercise of discretion since neither the Court of Appeals nor the Appellate Division made the express statement to that effect required by Rule 212 of the New York Rules of Civil Practice.

There is thus an adjudication, as between the parties in the Cadman case, that, so long as there is no requirement that any church join the union, no abridgment of congregationalism, no direct or beneficial interest in the funds of the boards and agencies and no threat of use of the funds for other than charter purposes, there is no right to a declaratory judgment.

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Again, however, the question is presented whether that adjudication is binding upon the parties to this action. As above indicated, all Congregational Churches, all members of the churches, all ministers of the churches, were represented by the plaintiffs in the Cadman case. As between them and the General Council which was defendant in the Cadman case, the adjudication that no case is made out for a declaratory judgment involving the relations between the joiners and non-joiners is binding. The bringing in of the boards, agents and instrumentalities as defendants in this action does not open the question under the finding of the Court of Appeals that the board's agencies and instrumentalities were agents of the General Council. The determination in the Cadman case is binding as to them. Moreover, the very fact that a retrial of the Cadman case on an issue between plaintiffs and the boards, agencies and instrumentalities might reach a different determination with respect to the same transactions from that reached when the issue was tried between plaintiffs and the General Council brings into play the doctrine of Israel v. Wood Dolson Co., 1 N.Y.2d 116, 151 N.Y.2d 1, 134 N.S.2d 97, supra, and Gart v. Cole, 2 Cir., 263 F.2d 244, supra.

IV. Requests for Declarations as to Polity, Usage and Practice.

Here again, is a request for substantially the same declaration as was asked in the Cadman case and was considered and referred to by the Court of Appeals when it affirmed a judgment dismissing the complaint on the merits for the express reason that the Basis or Union did not interfere with the Congregational manner of worship. This refusal of the Court of Appeals to make the

requested findings with respect to church polity is binding on the parties here just as was the refusal of the Court of Appeals to make findings with respect to the preceding group III.

V. Requests for Declarations as to Annuity and Retirement Benefits

As indicated above, possible loss of rights of ministers to annuity and retirement benefits was submitted to the Court of Appeals as a basis for a determination that the proposed union was unlawful. The matter was referred to by the Court of Appeals and the decision made that neither on this ground nor any other was the proposed union unlawful. Plaintiffs here, however, ask for declarations including the prospective operation of the annuity and retirement funds with respect to non-assenting ministers and lay workers. Insofar as there is a fund in which ministers and lay workers are entitled to participate there is already outstanding the judgment of the Court of Appeals to the substantial effect that no rights have been withdrawn. Insofar as plaintiffs wish a declaration that the present system will be maintained in perpetuity they are not entitled to it. While a suit for such a declaration may not be barred by res judicata it is just as effectively barred by the fact that plaintiffs are not entitled to the declaration.

VI. Requests for Declarations as to National Council.

This subject is not within plaintiffs' specifications and consideration of it is therefore eliminated.

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VII. Requests for Declarations as to United Church of Christ.

These requests raise the point that the actual facts present a problem different from that passed upon by the New York Court of Appeals. The point most strongly stressed by plaintiffs is that the Court of Appeals dealt with a projected union of communions while what eventuated was a union between the General Council of the Congregational Christian Churches and the defendant Evangelical and Reformed Church.

The mere fact that the union took a somewhat slightly different form from that described in the Basis of Union with Interpretations presented to the Court of Appeals would not necessarily mean that the decision of the Court of Appeals was not res judicata. Variation in details was inevitable. It is only in case that the change can be reasonably said to have affected the rights of plaintiffs and those represented by them in the Cadman case that persons bound by the matters adjudicated in the Cadman case in the Court of Appeals would be entitled to relitigate those adjudications.

In solving the question presented one must determine just what the Court of Appeals decided and just what the materials were upon which it based its decision. In determining that the plan when consummated would not injure the Cadman plaintiffs and those represented by them the Court of Appeals had before it the Basis of Union with Interpretations. On a construction of those papers depended the determination of the question whether the Cadman plaintiffs would be injured. In determining this question, however, the Court of Appeals accepted a construction of those documents based upon what it termed

to be concession and admissions by the General Council defendant in that case. Whether or not one would agree that the Court of Appeals acted correctly in giving weight to those admissions the fact was that the Court of Appeals reached the conclusion that the rights of the Cadman plaintiffs would not be infringed by the merger contemplated by the Basis of Union with Interpretations. That was an adjudication binding upon the Cadman plaintiff and those represented by it. It cannot now be reviewed by a member of that class even though he could convince the reviewing court that the New York Court of Appeals had reached the conclusion by a faulty process of reasoning or by accepting a hypothesis of facts which could not be supported. We start therefore with an adjudication by the New York Court of Appeals that the result contemplated by the Basis of Union with Interpretations would not infringe the rights of the churches, members or ministers with respect to ecclesiastical matters, church polity or property. The immediate question is, therefore, whether the union of the General Council of the Congregational Christian Churches with the Evangelical and Reformed Church is a departure from the Basis of Union with Interpretations. Whatever a union of communions may have meant as construed by the Court of Appeals, it certainly did not mean that every Congregational Christian Church would willy-nilly become a part of the United Church of Christ. A fundamental factor in the decision of the Court of Appeals that the rights of the churches would not be infringed was that no church would be required to be a member of the new United Church of Christ against its will. It is noteworthy that the Court of Appeals opinion, 306 N.Y. on page 163, 116 N.E. 2d 481, refers to "non-assenting" churches. Thus there could be a union of com-

munions which did not embrace all of the churches in the denomination known as the Congregational Christian Churches.

Plaintiffs' position with respect to this problem seems technical in the extreme. If there is any difference between a union of communions and a union of one communion with the highest administrative board of the other communion, insofar as the effect upon the churches whose administrative board was included is concerned the most serious effect would be where the union was truly one of one communion with another communion. The Court of Appeals has held that the proposed union of communions would not affect the rights of persons situated as are plaintiffs and that therefore they are not entitled to a determination of what their rights are. A fortiori, a union of an administrative body of the denomination to which plaintiffs belong, with another communion, would not affect plaintiffs' rights and thus no declaration of what their rights were should be given.

The next point made by plaintiffs raises a very serious question. They say that the form of the organization actually created does interfere with the traditional freedom of Congregational Churches. One way of answering this point would be to say that the Court of Appeals felt that if any Congregational Church did not like the new organization it did not have to join it. I do not, however, read the Court of Appeals decision so narrowly. The opinion went on to say, in substance, that the plan envisaged by the Basis of Union with Interpretations, even if accepted by a given Congregational Christian Church, would not constitute an interference in or abridgment of Congregational usage or practice. On that basis the judgment dismissing on the merits the suit for declarations was

affirmed. If the plan actually adopted differed from that outlined in the Basis of Union with Interpretations so that a different conclusion with respect to its effect upon the rights of Congregational churches could be reached reasonably the party should be entitled to litigate that question. I must bear in mind also that that question as to what effect the change might have upon the rights of the Congregational Churches is not before me but only the question whether the effect is so different from that contemplated that plaintiffs would have a right to a full dress trial of what that effect was and whether it would entitle them to a declaration of their rights under the new plan.

Fundamentally, plaintiffs' point is that the United Church of Christ as actually constituted turned out to be a much tighter organization than contemplated by the Basis of Union with Interpretations. It is said that the United Church of Christ is a legal entity with headquarters, officers, constitution and by-laws and that it was contemplated that the body which would have constitution and by-laws would be the General Synod of the United Church of Christ rather than the United Church itself.

The record does not support plaintiffs' position. The Basis of Union in Article IV-A provided for a constitution of the United Church. The Basis of Union in Article IV-N provided for headquarters for the United Church and contemplated by-laws (VIII-D-3 and F-1).

It is true that the Basis of Union with Interpretations says nothing about officers of the United Church of Christ. The constitution and by-laws, however, give to the president no greater power than the secretary of the General Council of the Congregational Christian Churches has.

Plaintiffs say and defendants deny that there were some departures from the procedure laid out by the Basis

of Union with Interpretations in the actual setting up of the United Church of Christ. The decision of the Court of Appeals that the Cadman plaintiffs had no rights that were affected by the proposed union and that therefore the judgment dismissing on the merits the plea for declarations was correct rested in no measure on any determination with respect to the procedure for setting up a new organization.

Moreover I am unable to find that there was any departure from the procedure contemplated by the Basis of Union with Interpretations submitted to the Court of Appeals. Plaintiffs' objection seems to be that the 300 persons purporting to act on behalf of the Congregational Christian Churches at the joint meeting at which it was declared that the union of the communions was effective were not designated by the Congregational Christian Churches but rather by the General Council of the Congregational Christian Churches. No way has been pointed out by which the Congregational Christian Churches could have appointed delegates. The Court of Appeals had before it the vote of the individual churches and noted that not even the recommended 75% of individual churches entitled to vote had formally approved. The Court of Appeals thus could not have contemplated unanimous action by the Congregational Christian Churches and their only general representative body was the General Council. The Court of Appeals must have contemplated that the 300 delegates would be appointed by the General Council.

Plaintiffs point out as a departure from the plan laid out by the Basis of Union with Interpretations two resolutions of the Uniting General Synod of the United Church of Christ providing that the present structures of the Congregational Christian Churches and the Evangelical and Reformed Church and their related boards, commis-

sions, agencies, etc. should be continued until such time as the constitution and by-laws of the United Church of Christ should have been duly submitted and approved as provided in the Basis of Union. The Basis of Union in Article X-D provided that the General Synod of the United Church of Christ at its first meeting should take appropriate steps necessary to insure the continuity and to effect the consolidation of the boards, commissions and other agencies and instrumentalities and to make effective an interim plan for their consolidation and operation as more explicitly set forth in Article VIII. Article VIII-A provided that the boards, commissions and other agencies and instrumentalities should proceed to correlate their work under the General Synod as rapidly as their charters, constitutions and property rights, the effectiveness of their program and the laws of the state would permit. How the postponement of the consolidation of the various subbodies until the adoption of the constitution and by-laws could have indicated a different result in the New York Court of Appeals, plaintiffs have not attempted to demonstrate.

Paragraphs 42, 43 and 44 of the constitution deal with conferences. They provide:

> "A Conference is that body of the United Church of Christ which is composed of all local churches in a geographical area and of all ministers who have standing in the Associations of that Conference or in the Conference itself.
>
> "Subsequent to the initial reorganization of Conferences in the United Church of Christ, the boundaries of any new Conference, or any adjustment of boundaries between Conferences, shall be determined by the Conferences concerned with the approval of

the General Synod. The standing of a Conference as a body of the United Church of Christ is determined by the General Synod.

"A Conference may retain or secure its own charter, and adopts its own constitution, by-laws and other rules which it deems essential to its own welfare and not inconsistent with this Constitution and the By-Laws of the United Church of Christ."

The provision that the constitution, by-laws and rules of a conference shall be not inconsistent with the constitution and by-laws of the United Church of Christ was not contained in the Basis of Union with Interpretations. In form it is mandatory and seems to limit autonomy. Defendants, however, point to paragraph 3 of the preamble to the constitution of the United Church of Christ, which reads as follows:

"3. The provisions herein define and regulate the General Synod and those instrumentalities of the United Church of Christ which are recognized, established by or responsible to the General Synod, and describe the free and voluntary relationships which the local churches, Associations, Conferences and ministers sustain with the General Synod and with each other. The pattern of relationships and procedures so described is recommended to local churches, Associations, Conferences and ministers, to enable them more effectively to accomplish their tasks and the work of the United Church of Christ."

They also point to paragraph 21 which reads as follows:

"21. The autonomy of the local church is inherent and modifiable only by its own action. Nothing

> in this Constitution and the By-Laws of the United Church of Christ shall destroy or limit the right of each local church to continue to operate in the way customary to it; nor shall be construed as giving to the General Synod, or to any Conference or Association, now or at any future time, the power to abridge or impair the autonomy of any local church in the management of its own affairs, which affairs include, but are not limited to, the right to retain or adopt its own methods of organization, worship and education; to retain or secure its own charter and name; to adopt its own constitution and by-laws; to formulate its own covenants and confessions of faith; to admit members in its own way and to provide for their discipline or dismissal; to call or dismiss its pastor or pastors by such procedure as it shall determine; to acquire, own, manage and dispose of property and funds; to control its own benevolences; and to withdraw by its own decision from the United Church of Christ at any time without forfeiture of ownership or control of any real or personal property owned by it."

There is also the preamble to the by-laws of the United Church of Christ which is essentially identical with paragraph 3 of the preamble to the constitution.

Similar provisions with respect to associations that closely parallel the provisions with respect to conferences are found in paragraphs 36, 37 and 38 of the constitution.

These new provisions which make the constitution and by-laws of the United Church of Christ supreme over the constitution and by-laws of the associations and conferences are the basis for the most serious argument that the

freedom of a Congregational Christian Church which joined the union would thereby be abridged. It is to be noted, however, that these provisions deal with the associations and conferences and not with the churches themselves. Section 21 of the constitution provides:

> "Nothing in this Constitution and By-Laws of the Uinted Church of Christ shall destroy or limit the right of each local church to continue to operate in the way customary to it; nor shall be construed as giving to the General Synod, or to any Conference or Association, now or at any future time, the power to abridge or impair the autonomy of any local church in the management of its own affairs * * *."

If the constitution had said that no church could take any action inconsistent with the constitution or by-laws, it is doubtful whether this general provision of section 21 that nothing in the constitution and by-laws of the United Church of Christ should destroy or limit the right of each local church to continue to operate in the way customary to it would render nugatory a specific limitation of its activities to those not inconsistent with the constitution and by-laws. Here, however, it is the associations and conferences whose actions are expressly limited and the provision of section 21 just quoted is quite appropriate and effective as a provision that, while such actions are not to be inconsistent with the constitution and by-laws, they must nevertheless not destroy or limit the right of each local church to continue to operate in the way customary to it.

This conclusion that the autonomy of the individual church is paramount means that the individual church may adopt its own constitution and that no contrary provision

of a constitution of an association or conference would be valid. Thus, conceivably, under constitutions adopted by themselves, a group of churches could set up associations and conferences with constitutions patterned in any way they wanted. The net result is that the provision that the constitutions of the associations and conferences shall not be inconsistent with the constitution of the United States Church of Christ is merely precatory. Its addition to the provisions of the Basis of Union with Interpretations deprives neither the churches nor the associations nor the conferences of any rights expressed in the Basis of Union and is well within the requirement of Article IV-A thereof that the constitution of the United Church of Christ shall be "based upon" the principles set forth in the Basis of Union.

I find nothing in the constitution and by-laws of the United Church of Christ which goes any farther than the Basis of Union with Interpretations in depriving any member of the classes represented by plaintiffs in this action of any rights. Plaintiffs in their argument in the course of the trial called attention to a long list of instances where the constitution and by-laws of the United Church of Christ were supposed to have departed, either by omission or commission, from the provisions of the Basis of Union with Interpretations. Not one of these departures except the ones just discussed with respect to the advice that the constitutions and by-laws of the conferences and associations should not be inconsistent with the constitution and by-laws of the United Church of Christ requires more for its refutation than the citation of the liberal provision in Article IV-A of the Basis of Union:

> "This constitution shall be *based upon* the principle set forth in this Basis of Union." (Emphasis supplied.)

Opinion of United States District Court, Southern District of New York in First Congregational Church of Burlington v. Evangelical and Reform Church (198 Fed. Supp. 677)

VIII. Requests for Declarations as to Boards, Agencies, Corporations and Instrumentalities.

Here plaintiffs assert the invalidity of any actions by which Congregational boards affiliate with the United Church or by which any change is made in the relationship between the boards and Congregational Christian Churches as existing prior to the formulation of the union. The New York State Court of Appeals affirmed the refusal to make such declarations because no rights of the Cadman plaintiffs would be infringed by the projected union. I have held that all of the parties plaintiff were represented by the Cadman Church. I have also held that all of the parties defendant in this case were represented by the General Council in the Cadman case, at least insofar as the present defendants choose to take advantage of the judgment in the Cadman case. The denial of the requested declarations with respect to the boards, agencies, corporations and instrumentalities by the New York Court of Appeals is thus res judicata in the instant case.

Declarations are requested with respect to a mortgage held by the defendant Congregational Church Building Society on the church property of plaintiff Mayfair Congregational Church of Toledo, Ohio. As held above, under headings I and II, however, rights with respect to such mortgages were among the rights which the New York Court of Appeals held had not been infringed and as to which there should be no declaration.

A declaration with respect to trust funds held by defendants is requested. The New York Court of Appeals, 306 N.Y. at page 164, 116 N.E.2d at page 485, accepted an agreement by all parties "that the funds held by the General Council and any of its agencies, boards and instrumen-

talities under express trusts, including pension funds, will not be affected". The Court of Appeals, 306 N.Y. on page 167, 116 N.E.2d 481, cited this as one of the reasons why there was no basis or necessity for a declaratory judgment. This adjudication that trust funds will not be affected by the proposed union is binding here. A similar declaration is asked with respect to restricted funds held by the defendant Congregational, boards, agencies and instrumentalities. Neither the complaint nor the specifications define these trust and restricted funds and in absence of such a definition no declaration can be made with respect to them.

Finally, plaintiffs say that three certain actions taken by various of the defendant Congregational boards and agencies constitute material departures from the Basis of Union with Interpretations, from representations and admissions made by defendant General Council in the course of the Cadman litigation and from Congregational polity, usage and practice.

As above held, the representations and admissions made to the court in the Cadman litigation did no more than assist the Court of Appeals in its construction of the provisions of the Basis of Union with Interpretations so that it is necessary to consider only the provisions of the Basis of Union with Interpretations. Similarly, it would be immaterial even if this court should find that the acts of the defendant boards violated Congregational polity, usage and practice if it was within the provisions of the Basis of Union with Interpretations which have already received the blessing of the State Court of Appeals in a judgment binding upon the parties here. My only question, therefore, is whether these actions constitute a material departure from the Basis of Union with Interpretations.

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The First of these three actions is the making of an agreement between the Board of Home Missions of the Congregational Christian Churches and the General Council of the Evangelical and Reformed Church, approved January 30, 1957. This agreement did no more than to provide for coordinating the work of the home mission boards of the two denominations pending the adoption of the constitution. The Basis of Union provided in Article VIII-A that the work of the various boards should be correlated. It is true that the Basis of Union in Article VIII-E provided that the homeland boards should from the time of the confirmation of the union until the adoption of a constitution function by means of a single corporate body. The fact that things did not progress that far before the adoption of the constitution is not such a change as to warrant re-examination of the decision of the New York Court of Appeals.

The other actions which plaintiffs charge are departures from the provisions of the Basis of Union with Interpretations are resolutions by the Annuity Fund for Congregational Ministers and the resolutions adopted by the General Council of the Congregational Christian Churches in 1958 on the one hand and resolutions by the Congregational Church Building Society and the General Council of the Congregational Christian Churches in 1958 on the other.

The latter resolutions concerned church mortgages and on their face added nothing to the seriousness of the question which was the subject of discussion under declarations I and II above when that matter was taken up. The resolutions of the Annuity Fund are intended to assure Congregational Christian Ministers of their continued membership in and benefits from the Annuity Fund, despite the fact that minister or church might not have an affiliation with the United Church. A similar 1947 resolution was before the

Court of Appeals in Cadman. Plaintiffs state that the 1947 resolutions and 1958 resolutions are not alike but do not explain how such differences as exist would vitiate the effect of the action of the State Court of Appeals.

Defendant American Board of Commissioners for Foreign Missions besides joining in the plea of res judicata raises points involving defenses peculiar to it. The only question that I have considered is whether defendants have made out a prima facie case that the Court of Appeals decision is res judicata. In deciding that question as it affects all parties I have not passed upon the question whether defendant American Board of Commissioners for Foreign Missions has any other defense to the case.

[3] The result of all of the foregoing is that defendants by their proof have made out a prima facie case of res judicata against all of the claims of all of the plaintiffs. While plaintiffs are entitled to adduce any evidence at their command to controvert defendants' proof of res judicata, defendants' evidence has not been of a character where any issue of fact can be raised and it is difficult to imagine an affirmative defense to a plea of res judicata. Nevertheless, there will be a formal resumption of the trial of the issue of res judicata at a time in the near future to be fixed by arrangement with my chambers.*

* The trial was resumed on June 7th, 1961 and upon its conclusion the District Court dismissed the complaint and, in its judgment dated July 14th, 1961 adopted the statements contained in the foregoing opinion as constituting its findings of fact and conclusions of law (Mich. App. 129a-131a).

Opinion of the United States Circuit Court of Appeals, Second Circuit, in First Congregational Church of Burlington v. Evangelical and Reform Church (305 Fed. 2d 724)

First Congregational Church and Society of Burlington, Iowa, et al., Plaintiffs-Appellants, v. *Evangelical and Reformed Church, et al.*, Defendants-Appellees, No. 320, Docket 27258, United States Court of Appeals, Second Circuit, Argued May 10, 1962, Decided August 1, 1962. Before CLARK, SMITH, and KAUFMAN, Circuit Judges.

CLARK, Circuit Judge.

Plaintiffs-appellants appeal from a decision of the district court dismissing their complaint on the grounds that all the matters stated therein had been previously adjudicated against all the plaintiffs and all classes of parties represented by them in a final adjudication by the New York Court of Appeals in Cadman Memorial Congregational Soc. of Brooklyn v. Kenyon, 306 N.Y. 151, 116 N.E. 2d 481. Plaintiffs had sought declaratory and other relief below, based upon the asserted invalidity of a far-reaching agreement of church union. Judge Dawson ordered the case to trial in denying summary judgment, D.C.S.D.N.Y., 160 F.Supp. 651;[1] thereafter Judge Dimock ordered a separate trial of the issue of *res judicata* and collateral estoppel; upon such trial he found for the defendants, see D.C.S.D.N.Y., 198 F.Supp. 677, and eventually entered the judgment appealed from. We here affirm that judgment.

This litigation has been protracted and acrimonious. It arose from the historic decision made by the defendant General Council of the Congregational Christian Churches

[1] In First Cong. Church and Society of Burlington, Iowa v. Evangelical and Reformed Church, D.C.S.D.N.Y., 21 F.R.D. 325, Judge Dawson denied the application of yet other interests to intervene as parties plaintiff.

of the United States to enter into a union with the defendant Evangelical and Reformed Church to form the United Church of Christ. After lengthy study and negotiation a group representing the Evangelical and Reformed Church and a commission appointed by the General Council met and adopted a document called the Basis of Union, which set forth the procedures to govern the proposed merger. In 1949, concluding that the merger had the approval of a sufficient percentage of the adherents of the Congregational Christian faith, the General Council voted to consummate the Union; and a similar decision was made by the Evangelical and Reformed Church.

The General Council's determination to consummate the merger is strenuously opposed by many of the Congregational Christian Churches. The non-assenting group believes that the proposed United Church of Christ represents a drastic change from the traditional polity of the Congregational Christian Churches. Since their origin in this country in 1620 these have been independent, self-governing fellowships without any central ecclesiastical control. These independent fellowships have, however, established certain regional associations and a national council, the defendant General Council of the Congregational Christian Churches of the United States. Also established on a national scale were the various boards, agencies, and corporations which are defendants to this action. Typical of these are the American Board of Commissioners for Foreign Missions, denominated "the agency of the Congregational Christian Churches for the extension of Christ's kingdom abroad," and The Annuity Fund for Congregational Ministers, a corporation whose purposes are obvious. These organizations administer substantial financial assets. And of course each Congregational Christian Church owns church prop-

erty the sum total of which runs into hundreds of millions of dollars.

The non-assenting churches believe that the merger would destroy or substantially alter the nature of Congregationalism. The United Church of Christ, it is contended, will be organized on presbyterian lines, as an authoritative church governed by ecclesiastical bodies with sovereignty over the constituent churches, members, and ministers. The non-assenters maintain that the General Council, which they believe to be an agency possessing only very limited delegated powers, lacked any authority to commit the Congregational Christian Church to any merger with another church. Thus they contend that the Basis of Union is wholly unauthorized. The non-assenters also assert that this unauthorized act by the Council commits all members of the Congregational Christian denomination to membership in the United Church of Christ, and it is claimed that if the non-assenters choose to remain outside that body they will be deprived of their rights in the assets held by the General Council, the funds, and agencies.

To halt this development, one of the non-assenting groups, the Cadman Memorial Society of Brooklyn and the Cadman Memorial Church, brought suit in 1949 against Helen Kenyon, the Moderator of the General Council. This suit, which was filed in the Supreme Court of New York State, was brought "on behalf of themselves and other Congregational Churches similarly situated." The Cadman Church and Society requested a declaratory judgment that the General Council had no power to consummate the Basis of Union or to unite with the Evangelical and Reformed Church; that no acts taken by the General Council can or will affect individual Congregational Christian Churches without their voluntary assent; that those churches which do join the new church will thereby lose all rights in and

control of the various corporations, boards, and instrumentalities which had been established for the furtherance of Congregationalism. Cadman also prayed for an injunction halting the merger of the churches and the consolidation of the corporations, boards, and agencies with their counterparts in the Evangelical and Reformed Church.

The state supreme court granted Cadman's pleas, declaring that the General Council was powerless to consummate the Basis of Union and enjoining any further actions in that direction. The court specifically enjoined the Council from uniting or transferring the corporations, agencies, and instrumentalities of the Congregational Christian Churches, or their funds and properties, with or to any agency of the Evangelical and Reformed Church or the United Church of Christ. Cadman Memorial Congregational Soc. of Brooklyn v. Kenyon, 197 Misc. 124, 95 N.Y.S.2d 133 (1950). On appeal, the Appellate Division reversed the judgment of the supreme court on the law and the facts, and ordered the plaintiffs' complaint dismissed. 279 App. Div. 1015, 1074, 111 N.Y.S.2d 808 (1952). This judgment was affirmed in a full opinion by the New York Court of Appeals, two judges dissenting. 306 N.Y. 151, 116 N.E.2d 481 (1953).

Subsequently on June 20, 1957, this action was commenced in the United States District Court for the Southern District of New York. The plaintiffs are other nonassenting churches, ministers, members of churches, and members of the various boards and agencies of the Congregational Christian Church. Defendants are the Evangelical and Reformed Church, the Treasurer of the General Council, the several boards, agencies, and corportaions, and the co-President of the United Church of Christ. Because determination of the precise nature of the relief requested by plaintiffs is crucial to a resolution of the issues raised

on this appeal, we find it necessary to set out at some length the gist of the voluminous and repetitive complaint.

The prayer for relief requests certain specific declarations to be made; these fall into several general classes. The first of these in essence ask for declarations that the Basis of Union is invalid, that the General Council lacked power to enter into the Union, and that the General Council could not merge or consolidate the agencies, boards, and corporations of the Congregational Christian Churches with those of the Evangelical and Reformed Church. The second class are requests for declarations that the statements in the Basis of Union that the ministers and members of each communion shall be enrolled in the United Church of Christ, and that the individual churches shall become members of that Church, are invalid and void. A third class are requests for declarations of the invalidity of the provisions of the Basis of Union purporting to alter the status of the General Council, agencies, and corporations by merging these with any similar bodies of the Evangelical and Reformed Church. A fourth class ask for declarations that the General Council cannot by its own act bring any individual church into the United Church of Christ, make any individual a member of the United Church of Christ, or enroll any minister as a minister of the new church. The final class of requested declarations are that no minister shall be required to withdraw "from the fellowship of the Congreational Christian Churches"; that the churches, ministers, and members may not "be deprived of their rights in and to the assets, properties and organizations of the Congregational Christian agencies and instrumentalities * * * by reason of their remaining Congregational Christian Churches, ministers and members instead of becoming part of the 'United Church of Christ.'" Further declarations are asked to the effect that the agencies and

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instrumentalities may not unite with agencies of the Evangelical and Reformed Church or with the United Church of Christ. Upon the separate trial ordered by Judge Dimock on defendants' affirmative defenses of *res judicata* and collateral estoppel and after long hearings, Judge Dimock in an extensive reasoned opinion granted defendants' motion to dismiss this complaint and thereafter entered the judgment of dismissal here under appeal.

[1] The issues raised by the appeal can be stated very simply: What was decided by the New York courts in the Cadman litigation? and who is bound by that determination under principles of *res judicata?* Plaintiffs maintain that the Cadman judgment cannot affect them, because they were not parties in that action and were neither in privity with nor represented by either of the two plaintiffs. They also maintain that the defendants in the present suit are not the same as those in Cadman and thus cannot plead that judgment in bar. Finally, plaintiffs contend that the dismissal of the Cadman complaint was solely for failure to join indispensable parties—a flaw they claim to have corrected. Since jurisdiction in this suit is grounded on diversity of citizenship, we look of course to the law of New York to determine these issues.

[2] The first question is whether plaintiffs, who were not named parties in the Cadman suit, may under applicable principles of *res judicata* be bound by the New York decision. New York, as most jurisdictions, permits representative actions to be brought by one or more members of a class of persons having common interests on behalf of the entire class. If the representation is adequate the determination in such a representative suit is binding on all members of the class. Brenner v. Title Guarantee &

Trust Co., 276 N.Y. 230, 11 N.E.2d 890, 114 A.L.R. 1010. Defendants maintain, and the trial court found, that the Cadman action was such a representative suit and that the present plaintiffs, having common interests with the Cadman Church and Society, and adequately represented by them, are bound by the judgment rendered by the New York Court of Appeals. Plaintiffs, on the other hand, point to a variety of differences between their situation and that of the two Cadman plaintiffs which they say take them out of the class properly represented in that action. Among the more crucial of these differences are that, unlike the Cadman Church and Society, some of the churches that bring this action have property which is subject to mortgages held by defendant The Congregational Church Building Society, and that here are joined ministers and individual church members, while there were no such parties represented in Cadman.

[3] To bind members of a class not named as parties to a suit, a representative action must fulfill certain prerequisites. All members of the class must be necessary—indispensable—parties to the suit; that is, their interests in its outcome must be joint or common so that the rights of all are necessarily affected by any action brought by one or more. Brenner v. Title Guarantee & Trust Co., supra, 276 N.Y. 230, 11 N.E.2d 890, 114 A.L.R. 1010. Where such a community of interests exists, a class suit will nevertheless not bind absent members of the class if the named parties or representatives actually have interests in the outcome of litigation adverse or not necessarily similar to those of all members of the class. Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22, 132 A.L.R. 741. The question whether in a particular suit the interests of an entire class are common and the representative shares

then will depend on the specific issues raised and decided in that litigation. See Brenner v. Title Guarantee & Trust Co., supra, 276 N.Y. 230, 11 N.E. 2d 890, 114 A.L.R. 1010. Thus to decide whether plaintiffs were, or could be represented in the Cadman litigation, we must also determine what the New York courts decided there.

[4] It is our conclusion that as to the issues actually raised and resolved by the New York Court of Appeals in Cadman, the plaintiffs therein and the present plaintiffs form one class having common interests, and all were adequately represented by the Cadman Church and Society. Since no legal issue not determined by Cadman is raised by the present complaint, the judgment of the district court dismissing plaintiffs' complaint must be affirmed.

(1) Both the Cadman plaintiffs and the plaintiffs here requested declarations that the General Council is powerless to effectuate the Union and thus the Basis of Union is invalid. Both asked for declarations that the General Council cannot by its own act unite the individual Congregational Christian Churches with the United Church of Christ. In Cadman, the New York Court of Appeals faced this issue and indicated that, at least as far as the civil courts could examine the question, the acts of the General Council were wholly proper. That court stated that "there is no power and none is claimed by which the General Council can compel or intends to compel the plaintiff Cadman or any other non-assenting church to join the Union unwillingly or impose upon them a change of faith or doctrine," and affirmed the validity of the Basis of Union. Cadman Memorial Congregational Soc. of Brooklyn v. Kenyon, supra, 306 N.Y. 151, 163, 116 N.E. 2d 481, 485. (It should be noted that even the dissenters

in the New York Court of Appeals agreed that the General Council was authorized to enter into the merger and implement the Basis of Union.) The questions of the validity of the General Council's action and its effect on individual congregations were legal issues in which all the present plaintiffs have the same interest as the Cadman plaintiffs and to which the differences in their various situations are irrelevant; and thus as to these questions the decree is binding on all.[2]

(2) Both in Cadman and in this case plaintiffs requested rulings that the merger of the boards, agencies, and corporations of the Congregational Christian Church was unlawful. The New York Court of Appeals pointed out that all the funds which were contributed to these charitable entities were given in the form of voluntary donations to be used by the corporations for their general purposes. It ruled that in such a case the civil courts can only scrutinize the expenditure of funds to determine if the use is not violative of charter purposes. Finding neither any direct interest of the plaintiffs in the funds nor any charter violations, it concluded that the complaint should be dismissed. Since the plaintiffs here, as the district court found, also all have made only voluntary contributions, if any, and no further charter violations are shown, the present plaintiffs were clearly members of the class represented by the Cadman Church and Society for purposes of resolving the status of the boards and agencies, and are bound by that decision.

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[2] While it is not wholly clear from the Court of Appeals decision whether it upheld the Basis of Union on the merits or because the question of its validity was beyond the cognizance of the civil courts, it would make no difference to resolution of the issues presented here which of these grounds of decision was in fact adopted.

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(3) There remains the request made by the present plaintiffs for a declaration that ministers, members, and non-assenting churches may not be deprived of their rights in the assets, properties, and organizations of the Congregational Christian agencies and instrumentalities. If they could show some right or interest adverse or dissimilar to that of the Cadman plaintiffs in these assets, etc., the present plaintiffs might prevail in their claim that the Cadman Church and Society could not adequately represent them in the litigation of such an issue. They have, however, made no such showing. While they point to certain differences of interest, no showing is made that these differences give plaintiffs here a claim or right to a declaratory judgment different from that asserted by Cadman. And while such a separate claim or right might arise, if, for example, a mortgage were foreclosed or a pension denied because of refusal to join the United Church of Christ, we cannot on the present record ascertain any imminently threatened interest which the present plaintiffs possess which so differentiates them from the Cadman plaintiffs, in terms of the issues there decided, that the Cadman plaintiffs could not adequately represent *all* the varying non-assenters.

[5] The final point raised is whether those defendants in this case who were not parties in Cadman may plead that decree as *res judicata*. Since all the defendants herein have the same interests as the General Council, which defended the Cadman litigation, they under the law of New York may claim the benefit of that decision, even if they may not be made to bear its burdens. Israel v. Wood Dolson Co., 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97; Gart v. Cole, 2 Cir., 263 F.2d 244, certiorari denied 359 U.S. 978, 79 S.Ct. 898, 3 L.Ed. 2d 929.

Affirmed.

Journal Entry Dismissing Complaint in Ohio Case

IN THE COURT OF COMMON PLEAS OF
LUCAS COUNTY, OHIO

KEITH WILSON, et al.,
Plaintiffs,

vs.

WASHINGTON CONGREGATIONAL CHURCH
Defendant.

This day this cause came on to be heard on plaintiffs' motion that conclusions of fact be found separately by the Court from conclusions of law; plaintiffs' one suggested conclusion of fact; defendant's objection to plaintiffs' proposed conclusion of fact and suggestions as to same; and plaintiffs' objections to proposed findings of fact and conclusions of law submitted by defendant; and the oral arguments, briefs and statements of counsel in connection therewith; and the Court being fully advised in the premises, finds that the motion that conclusions of fact be found separately by the Court from conclusions of law should be and the same hereby is granted to the extent and in the manner hereinafter set forth.

This day this cause further came on to be heard on the petition, answer, supplement to answer, reply, defendant's motion for summary judgment (and the affidavits and exhibits filed in support thereof and in opposition thereto or introduced in evidence at the time of the hearing), the records and briefs in prior litigation (hereinafter referred to), the oral arguments, briefs and statements of counsel, and upon the evidence.

Journal Entry Dismissing Complaint in Ohio Case

The petition in this action brought by the named plaintiffs as members of defendant Washington Congregational Church alleges that the vote of said church to become a part of the United Church of Christ effected a departure from the traditional doctrine, faith, dogma and procedures formerly held by defendant church as a church of the Congregational Christian faith and order; and as such deprived plaintiffs of their rights in its properties and assets. The petition also objects to the procedeure employed in taking such vote. The petition seeks to have the aforesaid vote declared void and to restrain defendant from carrying out the aforesaid vote in any way.

Defendant's answer contains a general denial and affirmative defenses in which it is alleged that issues here sought to be determined have already been adjudicated in two prior class actions in which the plaintiffs here were represented by the class plaintiffs which created an estoppel by judgment and was res judicata as to such issues. It is upon these defenses that defendant moves for summary judgment.

THE COURT BEING FULLY ADVISED IN THE PREMISES, FINDS that the pleadings, affidavits, admissions of the genuineness of papers and documents, and the evidence before the Court, show that there is no genuine issue as to any material fact but only disputed questions of law and that defendant Washington Congregational Church is entitled to judgment as a matter of law.

THE COURT FURTHER AND SEVERALLY FINDS AND SPECIFIES that each of the following facts exists without controversy or is not actually and in good faith controverted, to-wit:

1. An action was heretofore instituted in the Supreme Court of the State of New York, County of Kings, by the Cadman Memorial Congregational Society of Brooklyn and

the Cadman Memorial Church, suing on behalf of themselves and other Congregational Christian Church similarly situated, against Helen Kenyon, as Moderator of the General Council of the Congregational Christian Churches of the United States, as defendant. Final judgment in the said action (hereinafter referred to as the "Cadman case") was rendered in favor of said defendant and against said plaintiffs. The decisions in said action are reported at 195 Misc. 124, 95 N. Y. S. 2d 133, rev'd., 279 App. Div. 1015, 1074, 111 N. Y. S. 2d 808 (2d Dept. 1952), aff'd 306 N. Y. 151, 116 N. E. 2d 481 (1953).

2. An action was heretofore instituted in the United States District Court for the Southern District of New York by the Mayfair Congregational Church of Toledo, Ohio, its minister Angus MacDonald, one of its members, and others, as plaintiffs against Evangelical and Reformed Church, and others as defendants. Final judgment in that action (hereinafter referred to as the "Mayfair case") was rendered in favor of defendants and against plaintiffs, the decision being reported at 198 Fed. Supp. 677, under the title First Congregational Church and Society of Burlington, Iowa, et al., plaintiffs v. Evangelical and Reformed Church, et al., defendants. (Aff'd, Aug. 1, 1962, C.A. 2d Docket No. 27258).

3. On May 8, 1961, defendant Washington Congregational Church issued a letter to all its members accounting that a majority of such members had voted to approve the Constitution of the United Church of Christ and in favor of Washington Congregational Church becoming a part of it. Said vote was 154 for and 55 against approving such Constitution. The events leading up to the issuance of said letter dated May 8, 1961 by defendant are set forth in Paragraphs 7 to 11 inclusive of defendant's Answer and Appendix A and Appendix B thereto.

Journal Entry Dismissing Complaint in Ohio Case

4. Upon the filing of the petition in this case a temporary injunction was issued without notice to defendant or any hearing thereon, and service of the same, together with summons in this case, was served upon plaintiff Earl Dew as statutory agent for defendant.

THE COURT CONCLUDES AS MATTERS OF LAW THAT:

I. Plaintiffs in the Cadman case represented a class of which plaintiffs in the present action were members and claimed and sought declarations of rights and interests in the subject matter of the litigation which included all the rights and interests asserted by plaintiffs herein, (except plaintiffs' objections to the voting procedure employed). Plaintiffs herein are estopped by said judgment from litigating the issues presented herein (except plaintiffs' objections to the voting procedure employed) and said case is res judicata as to such issues.

II. Plaintiffs in the Mayfair case represented a class of which plaintiffs in the present action were members and claimed and sought declartions of rights and interests in the subject matter of the litigation which included all the rights and interests asserted by plaintiffs herein, (except plaintiffs' objections to the voting procedure employed). Plaintiffs herein are estopped by said judgment from litigating the issues presented herein (except plaintiffs' objections to the voting procedure employed) and said case is res judicata as to such issues.

III. Washington Congregational Church has taken lawful and proper procedure to approve the Constitution of the United Church of Christ and become a part of it and is now a local church of the United Church of Christ.

IV. The vote to approve the Constitution of the United Church of Christ and in favor of defendant, Washington Congregational Church, being a part of it, was in all respects legal and proper and did not involve any change whatsoever in the Constitution of defendant church.

V. The procedure employed by defendant on and prior to May 7, 1961, to secure a vote on approving the Constitution of the United Church of Christ and in favor of defendant church becoming a part of it, was in all respects legal and proper.

VI. The temporary injunction issued upon the filing of this case, without notice to defendant or hearing thereon, ought not to have been granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the temporary injunction heretofore issued in this cause without notice or hearing be and the same is hereby dissolved and terminated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' petition herein be and the same is hereby dismissed with prejudice at plaintiffs' costs and that judgment be and the same hereby is entered for defendant against plaintiffs for such costs.

To each adverse portion of this journal entry the respective parties object and except.

Appeal bond set at $200.00.

/s/ TOM D. STAHL,
Judge.

APPROVED AS TO FORM:

Attorneys for Plaintiffs

/s/ COBOURN, YAGER, SMITH & FALVEY
Attorneys for Defendant

Summary of this Litigation

Case and Court	Date Instituted	Trial Court Opinion	Appellate Court Opinion	Judgment of Court of Final Appeal
Cadman Case Supreme Court of New York	April 18, 1949	Held for Plaintiff, 197 Misc. 124 (1950)	Appellate Division of Sup. Ct. 2nd Dept. Reversed Trial Court 279 App. Div. 1015, 1074 (1952)	Court of Appeals, State of New York Affirmed reversal by Appellate Division.305 N. Y. 151 (1953)
Burlington Case U.S. District Court Southern District of New York	June 20, 1957	Judge Dimock, opinion 198 F. Supp. 677, March 31, 1961, Judgment June 14, 1961 held Cadman case res judicata	U.S. Court of Appeals (2nd Circuit) Affirmed Judge Dimock 305 F. 2d 724 August 1, 1962	U.S. Supreme Court Denied Writ of Certiorari, 372 U.S. 918, 9 L. Ed. 2d 723 Feb. 18, 1963
Ohio Case against Washington Congregational Church Court of Common Pleas of Lucas County (Toledo)	May 17, 1961	Judge T. D. Stahl held Cadman and Burlington res judicata and dismissed Complaint Sept. 4, 1962, Journal Entry	Court of Appeals of Lucas County Feb. 25, 1963 Judge C. L. Deeds Affirmed Judge Stahl	Supreme Court of Ohio Writ of Certiorari Denied Oct. 18, 1963, U.S. Supreme Court Denied Writ of Certiorari, 376 U.S. 912, 11 L. Ed. 2d 610 Feb. 17, 1964
Wyoming Case District Court, Fourth Judicial District in County of Sheridan, Wyoming	July 19, 1961	Judge J. O. Spangler, October 9, 1962 Held Cadman and Burlington res judicata and dismissed Complaint		Appealed to Supreme Court of Wyoming but appeal never perfected and finally withdrawn and Complaint dismissed by Order of Jan. 24, 1963
Michigan Case Circuit Court County of Wayne	June 22, 1961	Judge Miles N. Culehan, April 13, 1964 Held Cadman and Burlington res judicata and dismissed Complaint, Order and Judgment	Court of Appeals June 21, 1965 Judges Watts, Gillis and McGregor Affirmed Judge Culehan. See Opinion	Supreme Court of Michigan reversed and remanded, held Cadman and Burlington not res judicata Aug. 24, 1966
Wisconsin Case Circuit Court County of Waukesha	June 1961	Judge Wm. E. Gramling, June 1, 1964 Held Cadman and Burlington res judicata and dismissed Complaint		No appeal taken

Defendant's Motion to Dismiss Bill of Complaint in this Action

STATE OF MICHIGAN

IN THE

CIRCUIT COURT FOR THE COUNTY OF WAYNE

No. 611-604

HELEN JOAN BERKAW, GRACE PFAFF, FRANK C. SMITH and ROY L. STEPHENS, JR.,

Plaintiffs,

v.

MAYFLOWER CONGREGATIONAL CHURCH, a Michigan corporation,

Defendant.

MOTION TO DISMISS

(Filed July 19, 1961)

Now comes the above named defendant by Dykema, Wheat, Spencer, Goodnow and Trigg, its attorneys, and makes this motion to dismiss the above entitled cause and the plaintiffs' bill of complaint on the following grounds:

1. Plaintiffs are barred from maintaining this action by reason of two prior adjudications by which the matters raised in the complaint herein have been finally and conclusively determined against them.

a. By the final judgment in a certain action commenced on or about April 18, 1949 in the Supreme Court, State of New York, County of Kings, entitled

Defendant's Motion to Dismiss Bill of Complaint in This Action

"Cadman Memorial Congregational Society of Brooklyn and The Cadman Memorial Church, suing on behalf of themselves and other Congregational Christian Churches similarly situated plaintiffs, against Helen Kenyon as Moderator of the General Council of the Congregational Christian Churches of the United States, defendant." The decisions in said action are reported at 197 Misc. 124, 95 N. Y. Supp. 2d 133, reversed 279 App. Div. 1015 (2d Dept. 1952), aff'd 306 N. Y. 151, 116 N. E. 2d 481 (1953). The foregoing action was a class action and the plaintiffs herein are members of the class represented by the plaintiffs therein. The subject matter of the present action is encompassed and comprehended by the subject matter of the New York action. Accordingly, on accepted principles of full faith and credit and judicial comity, the plaintiffs herein are precluded by the judgment in said action.

b. By a certain action commenced in June, 1957 in the United States District Court for the Southern District of New York entitled "First Congregational Church and Society of Burlington, Iowa, et al., plaintiffs, v. Evangelical and Reformed Church, et al., defendants." The named plaintiffs in that action consisted of four Congregational Churches incorporated under the laws of states other than New York, including the First Congregational Church of Pontiac located in Pontiac, Michigan, together with individual plaintiffs consisting of ministers and members of various Congregational churches, including one Malcolm K. Burton, a resident of Pontiac, Michigan, and a member and minister of the First Congregational Church of Pontiac, Michigan. In addition, some of the plaintiffs were described as being members of various of the Congregational national

boards. The plaintiffs alleged that they were suing individually and as class representatives of churches, ministers and members of Congregational churches. The subject matter of the present action is encompassed and comprehended by the subject matter of the Federal Court action. The complaint in the Federal District Court action was dismissed on June 15, 1961 on the ground that all the matters stated therein had been previously adjudicated against all the plaintiffs individually and against each and every class represented by them by the final judgment in the Cadman action described in 1(a) above. The plaintiffs herein, having been members of the class represented in the Federal District Court action, are concluded by the adjudications made therein on principles of full faith and credit and judicial comity.

2. Plaintiffs are estopped by the judgments in the actions described in 1(a) and (b) above to the extent that those actions necessarily determined the issues between the parties hereto. The judgments and decisions in those actions determined inter alia:

a. The plan of union of the Congregational Christian Churches and the Evangelical and Reformed Church by its express terms, preserves to the respective local churches, conferences, conventions and associations complete autonomy of self government.

b. Under the union there would be no intrusion in or abridgement of traditional congregational polity and usage through fellowship of independent autonomous congregations free of authoritative control.

Defendant's Motion to Dismiss Bill of Complaint in This Action

c. The proposed union would in no way change the historical and traditional pattern of individual Congregational Christian churches.

d. Each member church will continue to possess the same freedom of faith and manner of worship as heretofore enjoyed.

e. There will be no interference in or abridgement of Congregational usage and practice.

f. All Congregational Churches, all members of the churches, all ministers of the churches were represented by the plaintiffs in the Cadman action and are bound by the judgment therein.

g. The Constitution of the United Church of Christ does not deprive any Congregational Christian church, minister or member of a church of any rights.

3. The complaint fails to state a cause of action under which the Court can grant the plaintiff relief in that it sets forth matters of a wholly ecclesiastical nature.

This motion is based upon the files and records in this cause and on the affidavits of Loren T. Wood and Louis R. Taylor attached hereto.

DYKEMA, WHEAT, SPENCER, GOODNOW & TRIGG,
Attorneys for Defendant,
2746 Penobscot Building,
Detroit 26, Michigan.

Dated: July 18, 1961.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 837

MAYFLOWER CONGREGATIONAL CHURCH,
a Michigan corporation
Petitioner,
against
HELEN JOAN BERKAW, GRACE PFAFF, FRANK C. SMITH and ROY L. STEPHENS, JR.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR RESPONDENTS IN OPPOSITION

ALFRED E. LINDBLOOM,
Counsel for Respondents,
1100 Ford Building,
Detroit, Michigan 48226.

January 6, 1967

Interstate Brief & Record Co., 356 Congress St. E., Detroit, Michigan 48226

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Michigan Court of Appeals (5a-13a)* is reported at 1 Mich. App. 252, 135 N.W. 2d 553 (1965). The opinion of the Supreme Court of Michigan and the concurring opinion (14a-46a) are reported at 378 Mich. 239, 144 N.W. 2d 444 (1966).

*References in parentheses, unless otherwise indicated, refer to pages of the separate Appendix to the petition herein. References preceded by "Mich. Apx." refer to pages of "Appellants' Appendix in the Supreme Court of Michigan."

JURISDICTION

The jurisdictional statement in the petition is not questioned because the petition lacks merit.

QUESTION PRESENTED

When the Court of Appeals in *Cadman* affirmed the judgment of the Appellate Division which expressly made no determination of questions of doctrine, polity or other ecclesiastical matters, did the Supreme Court of Michigan correctly decide that the action instituted by the faithful minority of petitioner was not barred by *Cadman*?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provision of the United States Constitution and the statute involved are set forth in the petition at p. 4.

STATEMENT OF THE CASE

On June 22, 1961, respondents, as members in good standing of petitioner church, brought suit for the protection of the rights and interests of themselves and other persons who might desire to worship according to the uses and practices to which the property of the church had been dedicated. The Mayflower Church was organized in 1930 under Act 53 of the Michigan Public Acts of 1901 entitled "An Act for the Organization of Corporate Congregational Churches." The purpose of the church, as stated in its articles of incorporation, which has continued ever since without amendment or change, is to worship and labor

together as a church according to the faith and usages of churches called Congregational (Mich. Apx. 4a).

The complaint alleges, in some detail, the unique doctrines and practices of Congregational Churches which freed each local church from all external state or ecclesiastical control and guaranteed freedom in its own affairs including the calling or ordaining of its own Ministers and officers, the formulation of its own covenants and confession of faith, the adoption of its own sacraments and the interpretation and observance thereof and all other particulars of church government which can be conceived. These doctrines and practices have continued in the local churches to date (Mich. Apx. 4a-6a).

The General Council of the Congregational Christian Churches in cooperation with the Evangelical and Reformed Church had formed a new church named the United Church of Christ to be composed of the Evangelical and Reformed Church and all of its local churches and such of the local Congregational Churches as may desire or be induced to become a part of the United Church of Christ. A constitution for the United Church of Christ had been formulated and submitted to each local Congregational Church inviting approval and action to become a part of the United Church of Christ. On April 30, 1961 by a vote of 253 for and 204 against Mayflower Congregational Church approved the proposed constitution and accepted the invitation to become a part of the United Church of Christ (Mich. Apx. 6a, 7a).

The complaint further alleges that the proposed constitution would, in fact, impair and abridge the autonomy of a local Congregational Church. The constitution, among other things, governs sacraments, ordination of Ministers and the calling of a Pastor, which have been a local church's own affairs since the time of the landing of the Mayflower.

Further, the amending power of the proposed constitution is solely in the General Synod of the United Church and its conferences. A local church has no voice in such amendments (Mich. Apx. 7a, 8a).

The plaintiffs also allege that to make the Mayflower Church a part of the United Church of Christ would work a change in religious practices not conformable with the origin and historic character of the faith to which the church property is dedicated and would divert the property of the church to the support of doctrines fundamentally opposed to the characteristic doctrines of Congregationalism and would violate the rights of the faithful minority and deprive them of the use of the church property (Mich. Apx. 9a).

The complaint prays that the Court quiet title to the real estate and personal property of the church in the plaintiffs and such other persons who may desire to worship according to the faith and usages of churches commonly called Congregational, and that the Court determine that such property may not be used except according to the faith and usages of churches commonly called Congregational (Mich. Apx. 10a).

Petitioner herein, the defendant therein, filed a motion to dismiss the bill of complaint, claiming that the plaintiffs were barred from maintaining the action by reason that two prior adjudications by which the matters raised in the complaint had been finally and conclusively determined against them and that the plaintiffs were estopped by the judgments in those two actions from maintaining the action (106a-109a).

The trial court entered an order holding that the two cases upon which defendant relied were *res adjudicata* of the issues involved in plaintiffs' action and that plaintiffs were estopped by the judgments from litigating the issues set forth in the complaint (1a-4a).

The Michigan Court of Appeals affirmed the trial courts' order and judgment finding that there was no genuine issue of fact presented incident to the granting of defendant's motion and that no prejudicial error to plaintiffs occurred during any of the proceedings (5a-13a).

The Michigan Supreme Court reversed the Michigan Court of Appeals and remanded the cause to the Circuit Court for the County of Wayne for further proceedings in accordance with the opinion (14a-46a).

ARGUMENT

The petition seeks review of a judgment of the Supreme Court of Michigan which petitioner asserts did not accord full faith and judgment to a judgment of the courts of New York. It is necessary to study in some detail all three of the judgments entered by the various New York courts in *Cadman* to understand what was and what was not decided in that case.

I.

CADMAN DID NOT DETERMINE THE ISSUE INVOLVED IN THE MICHIGAN CASE

The trial court in *Cadman* held in effect that the merging of Congregational Churches with the Evangelical & Reformed Church would constitute a departure that is a change in the practices, polity, doctrines, government and other ecclesiastical matters and granted the plaintiffs in that case most of the relief they sought, 197 Misc. 124, 95 N.Y.S. 2d 133 (1950).

The defendant appealed to the Appellate Division which held that inasmuch as the plaintiffs had not established any property rights in the assets held or controlled by de-

fendant the Court had no right to consider ecclesiastical matters and dismissed the suit, 279 App. Div. 1015 (1952).

A motion was made before the Appellate Division to resettle order. This motion was denied but on the Court's own motion, its decision was amended by adding thereto the following:

> "Findings of fact, express and implied, inconsistent with the foregoing, except such findings as were made expressly or by implication, upon questions of doctrine, polity and other ecclesiastical matters, are reversed. For the reasons heretofore stated, this court has not considered and has made no determination upon the questions of fact arising upon the issues as to such ecclesiastical matters."

The amended decision is found in 279 App. Div. 1074, 1076, 111 N.Y.S. 2d 808 (1952).

The judgment as entered on June 3rd 1952 aside from formal parts reads:

> "ordered that the judgment so appealed from be reversed on the law and the facts, with costs; and plaintiffs' complaint and defendant's counterclaim dismissed, with costs to the defendant; and by said amended order having ordered that findings of fact expressed and implied inconsistent with its opinion and decision slips be reversed, *except such findings as were made expressly or by implication, upon questions of doctrine, polity and other ecclesiastical matters, which matters were not considered by said Appellate Division and as to which it has made no determination.*" * * * (Mich. Apx. 241a, 242a). (Emphasis supplied.)

The plaintiffs alone appealed to the Court of Appeals of New York. Its opinion is found in 306 N.Y. 115, 116

N.E. 2d 481 (1953). A judgment was entered in the Court of Appeals on the third day of December, 1953 in words and figures (aside from formal recitals) as follows:

> "And it was also further ordered, that the records aforesaid, and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.
>
> Therefore, it is considered that the said judgment be affirmed without costs, as aforesaid."

On the remittitur as provided in the Court of Appeals judgment above quoted, judgment was entered in the Supreme Court on January 25, 1954, as follows:

> "Adjudged that the order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court; and it is further
>
> Adjudged that the judgment entered herein on the 3rd day of June, 1952, be and the same hereby is affirmed" (Mich. Apx. 244a).

It is this judgment of the New York Courts (all three must be taken together) which expressly and explicitly states (in the italicized portion above quoted) that

> "questions of doctrine, polity and other ecclesiastical matters * * * were not considered * * * and as to which it has made no determination."

which counsel for petitioner now asserts was not accorded full faith and credit by the Michigan Supreme Court whereas in fact and in law the Michigan Supreme Court acted in complete recognition thereof and in accordance therewith.

The legal effect of the above quoted provision of said New York judgment cannot be other than that the Supreme Court judgment *against the merger* continues in full force as to matters of "doctrine, polity and other ecclesiastical matters."

The official report of the New York Court of Appeals states that the counsel for the defendant in *Cadman* (one of whom is counsel for petitioner herein) there contended—

> "III. Under the common law, and under the First and Fourteenth Amendments to the United States Constitution and under section 3 of article I of the New York Constitution, the court was without jurisdiction over these religious and ecclesiastical matters and without lawful power to make the judgment. (*Shelley v. Kraemer*, 334 U.S. 1; *Watson v. Jones*, 13 Wall. [U.S.] 679; *Everson v. Board of Education*, 330 U.S. 1; *Zorach v. Clauson*, 343 U.S. 306; *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94.)"

See 306 N.Y. at 157.

In this contention counsel was right for in the last case cited in the last above quotation—

> *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)

which was again before the Court in 363 U.S. 190, no issue of property right was involved. The sole issue was as to the control of a religious corporation. The New York Legislature adopted an act which by its terms vested control of the corporation in a designated party. This was upheld by the New York Court of Appeals but was held invalid by the United States Supreme Court; the Court after referring to an earlier case said:

> "The opinion radiates, however, a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, *matters of church government as well as those of faith and doctrine. Freedom to select the clergy*, where no improper methods of choice are proven, we think, must now be said to have federal

> constitutional protection as a part of the free exercise of religion against state interference." (Emphasis supplied.)

First Congregational Church & Society of Burlington et al. v. Evangelical and Reformed Church, et al., 305 F. 2d 724 (CA 2d 1962) cert. den. 372 U.S. 918, is referred to on page 3 of petition. This was a second case attacking the merger. It was brought to the Federal Court by different plaintiffs non-residents of New York and sought to establish interest in the same property of the General Council, its boards and agencies. The Court of Appeals in that case said in relation to *Cadman:*

> "While it is not wholly clear from the Court of Appeals decision whether it upheld the Basis of Union on the merits or because the question of its invalidity was beyond the cognizance of the civil courts, it would make no difference to resolution of the issues presented here which of these grounds of decision was in fact adopted." Footnote p. 729.

And then in the opinion said:

> • • • "If they could show some right or interest adverse or dissimilar to that of the Cadman plaintiffs in these assets, etc., the present plaintiffs might prevail in their claim that the Cadman Church and Society could not adequately represent them in the litigation of such an issue." 729 Col. 2, lines 23-29.

Thus clearly indicating that in the opinion of that Court there was no *res judicata* of the ecclesiastical issue if different property interests were shown. Of the property interest of the plaintiffs in this Mayflower case there is no question.

The *ecclesiastical subject matter* of this Mayflower case also is substantially different from that before the Court in *Cadman*. In this Mayflower case the plaintiffs allege that the provisions of the constitution of the United Church of Christ, which was then proposed and is now a fact, were contrary to the tenets, doctrines, polity, government and other ecclesiastical characteristics of Congregationalism (Mich. Apx. 6a-9a). This constitution did not exist at the time of *Cadman*—the drafting had not been begun. The final draft of the constitution was distributed in July of 1960 for action by the local churches "by midnight June 1, 1961" and to take effect July 8, 1961. The New York Court had before it in *Cadman* the "Basis of Union" (with Interpretations) which stated that various provisions were to continue "until the adoption of the Constitution." The following are substantial matters in which there are material differences:

1. In respect of the *Ordination of Ministers,* the Basis of Union provides, VI. A, (Mich. Apx. 47a), "until a standard method is provided by the Constitution," ordinations shall be "in the same way, as before the union." In the Constitution, a standard method is provided and ordination is declared, (Const. Section 27, Mich. Apx. 141a)—"the *rite* whereby the *United Church*" confers "ministerial standing" on a person "God has called to the Christian ministry." The United Church acts "through an association in cooperation with the local church." This is a long way from "the same way as before the union." The historic way was for the local church to convene by invitation a council of other churches of the vicinage—such nearby churches as were known to be of similar view—which council carried through the function. The Association had nothing to do with ordination unless invited by the local church and then functioned as such a council and not as an association. Under Section 27 the local church can act only with

the cooperation of the Association. If it may be said that the Association cannot ordain alone neither can the local church without the Association as it could before. It must obtain the concurrence of its cooperator Association or nothing can be done and the ordination is made a rite of United Church and not of the local church.

This function of the local church "before the union" has been well described by *Leon Howard* (an Episcopalian) in *Literature and the American Tradition,* Doubleday 1960, p. 20, as follows:

> "A new way of church government, which freed each congregation from all external state or ecclesiastical control and guaranteed that freedom by allowing each to *call* and *ordain* its own ministers and officers and by giving each the absolute power to admit, release, admonish or excommunicate its own members." (Italics supplied.)

To say that this was passed on in *Cadman* is absurd when the Basis of Union expressly provided there would be a superseding standard method provided by the Constitution. To say that the new provision of the Constitution is not "an interference in or abridgment of Congregational usage and practice" is equally absurd.

2. As to the *Calling of Ministers,* the Basis of Union provides, VI C (Mich. Apx. 48a), "Ministers and churches desiring to maintain a system of pastoral placement in which the Conference or Association shall have little or no part shall be free to do so." The Constitution, Section 30, (Mich. Apx. 141a), states that the relationship between the minister and the local church "is also a concern of the Church at large as represented by an Association and a Conference." By Section 21 Constitution, line 12, (Mich. Apx. 140a), the local church may "call or dismiss its pastor or pastors by such procedure as it shall determine." Note

that this is limited to *procedure* and does not extend to the substantive *who may be called, where from and his qualifications.* The call is declared to be a "concern of the Church at large" (Const. Sec. 30, Mich. Apx. 141a). A minister of another denomination cannot be called unless the Association grants him Privilege of Call, and this is done only after examination by "The committees on the Ministry of the Conference and Association" (By-Law 132 at 161a). "Installation or recognition" upon acceptance of a call is a function of the Association (By-Law 128 Mich. Apx. 160a).

3. Amendments to the Constitution are by the Basis of Union stated to be "made by the General Synod and ratified by the Conferences in collaboration with the Associations and *Congregations.*" (Emphasis supplied.) (XG Mich. Apx. 67a.)

The section of the Constitution providing for amendment gives the "Congregation" (local church) no voice whatsoever in the making of amendments (Sec. 88 Mich. Apx. 153a). The power of amendment is vested in the General Synod and State Conferences. The local church has no voice in the matter. There is no limitation on the scope of the amendments which may be made. The local church has only the atlernative of accepting the amendment or withdrawal from United Church (Const. Art. IV, Sec. 21, last clause Mich. Apx. 140a). The vote of the majority of members voting of the local church is determinative on the issue of withdrawal. *The right of the minority under the principle quoted* from *Davis v. Scher,* 356 Mich. 291 (1959), ceases to exist when a local church goes into the United Church—by going in they agree to be bound by the majority.

Much is sought to be made (and was before the Michigan Supreme Court) of the statement in the last paragraph of the New York Court of Appeals opinion

> "the Basis of the Union is voluntary and in no way interferes with Congregational faith or manner of worship," (59a).

The Court had earlier in its opinion found that—

> No "action taken by the General Council leading to a consummation of the Basis of Union will in any way obligate the individual church to join in the Union except through its own voluntary action" (54a).

Thus the New York Court could well say—

> "no ecclesiastical question is presented" (54a).

Nor could such question be presented unless and until the majority of some local church voted to go into the Union and the minority were sufficiently concerned to go to court.

No local church was in any way bound by anything the General Council did and the local church was held not to have any interest recognizable in law in the General Council, its boards and agencies.

II.

DEPARTURE IS AN ECCLESIASTICAL QUESTION

On page 17 of the petition, petitioner argues that the departure issue is not an ecclesiastical question. This argument comes as a suprise because at all stages of the Michigan case it was understood that departure was an ecclesiastical question. When the defendant's motion to dismiss was first argued on September 20, 1961, the counsel for petitioner herein was asked the following question:

> The Court: Do you agree, Mr. Wood, that "departure" is a part of doctrine?
>
> Mr. Loren T. Wood: Yes. (Page 58 of the transcript of the argument before Judge Neuenfelt, Circuit Judge.)

The Appellate Division in *Cadman* treated the term "doctrine" as an ecclesiastical question because it said "questions of doctrine, polity and other ecclesiastical matters." See also the opinion from *Kedroff v. St. Nicholas Cathedral* found on page 8 hereof.

The term "departure" merely means a change in the doctrines, polity, tenets, government or organization of a church. It is apparent that all that the word "departure" means, as used herein, is a change of an ecclesiastical nature. Hence "departure" is an ecclesiastical question.

III.

THE MICHIGAN DECISION IS CLEARLY CORRECT

The Supreme Court of Michigan, as shown by its opinion, did carefully consider the two New York cases relied upon by petitioner and correctly determined that those cases did not bar the suit instituted by respondents here. If the Court of Appeals in *Cadman* intended to broaden the decision of the Appellate Division that jurisdiction should not be taken because of the lack of property interest in plaintiffs, the Court of Appeals would not have affirmed the judgment of the Appellate Division. That judgment said that no ecclesiastical questions were considered, and the Court of Appeals would not have affirmed that judgment without modification if it intended to decide any ecclesiastical questions.

IV.

THERE IS NO QUESTION OF FEDERAL LAW

The Michigan Supreme Court did accord full faith and credit to both *Cadman* and *Burlington*, and, therefore, no rights of petitioner under the full faith and credit clause were denied.

It is also suggested in the petition, page 12, that if the case is not reviewed now there will be "a long and burdensome trial" and that the *Cadman* case took twenty-three days. Counsel for respondents do not believe that counsel for petitioner can make the Michigan case last any such time. The case should be a relatively short one.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

ALFRED E. LINDBLOOM,
Counsel for Respondents,
1100 Ford Building,
Detroit, Michigan 48226.

Dated: January 6, 1967.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 837

MAYFLOWER CONGREGATIONAL CHURCH,
a Michigan corporation,
Petitioner,

against

HELEN JOAN BERKAW, GRACE PFAFF, FRANK C. SMITH and ROY L. STEPHENS, Jr.,
Respondents.

PETITIONER'S REPLY BRIEF

LOREN T. WOOD,
Counsel for Petitioner,
No. 60 Wall Street,
New York, N. Y. 10005.

DAVID W. PECK of New York,
JOHN T. REDMOND of New York,
H. GORDON WOOD of Detroit,
LAURENCE D. CONNOR of Detroit,
EDWARD W. KEANE of New York,
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Respondents.

PETITIONER'S REPLY BRIEF

I.

The judgment and opinion of the New York Court of Appeals are alone controlling as to what that Court adjudicated in the *Cadman* case.

Respondents have abandoned the entire theory upon which the Michigan Supreme Court denied full faith and credit to the judgment of the New York Court of Appeals in the *Cadman* case and, instead, have contrived a technical argument, using selected portions of the order and judgment of the intermediate appellate court in New York in an effort to demonstrate that the New York Court of Appeals did not decide the departure issue.

This argument is in substance a contention that in affirming the judgment of the Appellate Division, the New York Court of Appeals thereby adopted as its own reasons given by the Appellate Division for its judgment. Only by ignoring the clear import of the Court of Appeals opinion as well as the operative portions of the judgments of both the Appellate Division and the Court of Appeals could respondents have arrived at this conclusion and the absurdity of stating (Resp. Br. p. 7) that the New York trial court's "judgment against the merger continues in full force"—despite the dismissal of the *Cadman* complaint "on the merits" (59a).

The operative portions of the judgments of the three New York courts in the *Cadman* case unequivocally express the disposition made in each such court. The trial court in its judgment, after noting that both sides had waived formal findings of fact and conclusions of law, went on to grant the broad relief sought by the plaintiffs. The judgment of the Appellate Division, entered on June 3, 1952, after noting its reversal of the trial court on the law and the facts, stated (Mich. Apx. 242a):

> "Adjudged that the judgment so appealed from, be and the same is hereby reversed on the law and the facts, and plaintiffs' complaint and defendant's counterclaim dismissed; and it is
>
> "Further Adjudged that the plaintiffs' complaint be and the same hereby is dismissed; and it is
>
> "Further Adjudged that the counterclaim be and the same hereby is dismissed."

The New York Court of Appeals held that "the complaint was properly dismissed on the merits" (59a) and the judgment dated January 25, 1954 entered on that court's remittitur stated (Mich. Apx. 244a):

> "Adjudged that the judgment entered herein on the 3rd day of June, 1952 be and the same hereby is affirmed."

The judgment of the New York Court of Appeals, standing apart from the opinion, affords little insight to the

grounds and reasons upon which it is based. In such cases, it is permissible and desirable to examine the opinion in order to determine the issues actually presented and passed upon by the court awarding the judgment. *Irwin* v. *Dowd*, 359 U. S. 394 (1959); *Great Lakes Dredge & Dock Co. et al.* v. *Huffman*, 319 U. S. 266 (1943); *Radford* v. *Myers*, 231 U. S. 725 (1913). This was precisely the procedure followed by the Federal courts in the *Burlington* case and by the Michigan courts in this case. It is noteworthy that the Michigan Supreme Court did not base its decision on the argument which is now offered to this Court by the respondents.

The New York Court of Appeals, in its opinion, stated the grounds upon which it affirmed the judgment below. That court was not bound to, nor did it, adopt the grounds stated by the Appellate Division in its opinion and order. Moreover, it was not necessary for the New York Court of Appeals, in affirming the judgment of the Appellate Division dismissing the complaint, to affirm, reverse, modify or otherwise comment upon the Appellate Division's statement in its order, which also appeared in its opinion, that it did not consider matters of doctrine, polity and ecclesiastical matters. Under the New York law, which must be looked to in any construction of the New York judgment, it is well established that an affirmance without opinion by an Appellate Court does not imply approval of the reasoning or grounds upon which the judgment below has been based, but merely approves of the result reached. *Commissioner Public Works* v. *Johnson*, 265 N. Y. 440 (1934); *Adrico Realty Corp.* v. *City of New York*, 250 N. Y. 29 (1928); *Miller* v. *Homeowners Loan Corp.*, 263 App. Div. 607 (2d Dept. 1952); *People ex rel. Kniffen* v. *Knight*, 184 Misc. 545 (1945).

Therefore since the Court of Appeals in the *Cadman* case set forth in detail its reasons for affirming the Appellate Division's judgment dismissing the complaint and since

it did so in a lengthy opinion in which all of the issues, including alleged departures from Congregationalism, were examined and determined. Its decision alone controls as to the grounds upon which the judgment was rendered and the adjudications made.

The New York Appellate Division's observations as to the findings which it did not make were placed in its order for the purpose of compliance with Section 602 of the New York Civil Practice Act (the Act in effect at the time of the *Cadman* case), the purpose of which was to apprise the New York Court of Appeals of the extent to which the Appellate Division dealt with the issues of law and fact presented to it. Obviously, such recitals could not become part of the adjudications made by the Court of Appeals unless expressly adopted by it.

Moreover, as noted in the Petition (footnote p. 18), the *Cadman* trial court expressly stated that it "did not deal with any ecclesiastical matters". Thus, the Appellate Division's general statement that it did not consider such matters could have had no reference to any specific findings by the trial court and thus cannot now be read to constitute an acceptance by the New York Court of Appeals of any such findings. As we have pointed out Petition, p. 18) there was complete agreement between the parties in *Cadman* as to the doctrine and polity of Congregationalism. The sole task of the New York courts was to determine, *as a matter of law,* whether the Basis of Union departed from that undisputed standard.*

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* We have drawn this Court's attention to the fact that the Constitution of the United Church, which is in dispute in this case, was to be "based on the principles set forth in the Basis of Union" and was held by the *Burlington* court to be in conformity with the Basis of Union. (Petition, pp. 6 and 9.)

II.

The United States Court of Appeals recognized the *Cadman* issues as legal issues.

Respondents' argument (Br., p. 9) and their quotation from the *Burlington* opinion relate to the adequacy of the *Cadman* plaintiffs' representation of the class of which respondents are members, a matter not stated by the Michigan Court as a ground for its denial of credit to the New York decision and thus a matter not before this Court. The Michigan Court assumed for the purposes of its decision that the respondents "are within a class represented by the *Cadman* and *Burlington* plaintiffs" (43a).

However, it is relevant that the United States Court of Appeals held that the validity of the General Council's action *and its effect on individual congregations* were legal issues (98a). It also held that the *Burlington* and *Cadman* plaintiffs formed one class and that no legal issue not determined by *Cadman* was raised in the *Burlington* complaint and the latter must be dismissed (97a). That is precisely the situation in this case with respect to the departure issue.

III.

The United Church Constitution does not limit the autonomy of the local church.

While there is no justification for respondents' extensive argument of the merits of the case on pages 10 through 13 of their brief and no requirement that petitioner reply to this argument, petitioner's silence should not be construed as an agreement that amendments to the Constitution of the United Church can affect the autonomy of the local church or require it to withdraw from the United Church in order to avoid accepting the amendment. Para-

graph 3 of the Constitution provides that the Constitution regulates only the General Synod and not the churches. Paragraph 21 acknowledges that the autonomy of the local church is inherent and that the Constitution gives no organization any power to abridge that autonomy (Mich. Apx. 136a, 139a).

CONCLUSION

It is submitted that the petition herein should be granted.

Respectfully submitted,

LOREN T. WOOD,
Counsel for Petitioner,
No. 60 Wall Street,
New York, New York.

DAVID W. PECK of New York
JOHN T. REDMOND of New York
H. GORDON WOOD of Detroit
LAURENCE D. CONNOR of Detroit
EDWARD W. KEANE of New York
of Counsel

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